No. 96-262-CMY

Docketed:
August 16, 1996

Title: Jon E. Edmond, Petitioner
v.
United States
and
Jake A. Lazenby, Petitioner
v.
United States
and
Michael B. Leaver, Petitioner
v.
United States
and
James A. Leonard, Petitioner
v.
United States
and
Robert J. Nichols, Petitioner
v.
United States
and
Donald H. Venable, Petitioner
v.
United Staets

Court: United States Court of Appeals for the Armed Forces

Entry	Date	Proceedings and Orders
	Aug 16 1996	Petition for writ of certiorari filed. (Response due October 16, 1996)
	Sep 13 1996	Order extending time to file response to petition until October 16, 1996.
	Oct 11 1996	Brief of respondent United States in opposition filed.
	Oct 23 1996	DISTRIBUTED. November 8, 1996
	Nov 8 1996	Petition GRANTED. The brief of petitioners is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, December 23, 1996. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, January 22, 1997. A reply brief, if any, is to be filed pursuant to Rule 25.3. Rule 29.2 does not apply. SET FOR ARGUMENT February 24, 1997. **********
	Nov 25 1996	Motion of petitioner to dispense with printing the joint appendix filed.
	Dec 9 1996	Motion of petitioner to dispense with printing the joint appendix GRANTED.
	Dec 23 1996	Brief of petitioner Jon E. Edmond filed.
	Jan 17 1997	CIRCULATED.
	Jan 22 1997	Brief of respondent United States filed.
	Feb 4 1997	Record filed.
	Feb 13 1997	Reply brief of petitioners Jon Edmond, et al. filed.
	Feb 24 1997	ARGUED.

(1)

Supreme Court, U.S.
FILED

96 262 AUG 16 1996

NO. 96- OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

JON E. EDMOND, PETITIONER

v.

THE UNITED STATES OF AMERICA, RESPONDENT

AND OTHER CASES

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

PETITION FOR A WRIT OF CERTIORARI

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92 pp

QUESTIONS PRESENTED

1. Did the Court of Appeals for the Armed Forces err in concluding that judges of the military Courts of Criminal Appeals, who have expansive authority to decide questions of law and fact, most of whose decisions are never reviewed by higher authority, and who have no "superior officer" over them, are nonetheless inferior officers under the Appointments Clause of the Constitution?

2. If such judges are inferior officers, did the Court of Appeals err in finding the authority to appoint them in a general residual appointment authority, even though Congress has specifically provided for another method of appointment for such judges which admittedly does not satisfy the Appointments Clause?

LISTING OF PARTIES PURSUANT TO RULE 24.1(b)

Jon E. Edmond, U.S. Coast Guard
USCAAF Dkt. No. 93-1292/CG
CGCCA Dkt. No. 999

Jake A. Lazenby, U.S. Coast Guard
USCAAF Dkt. No. 95-0941/CG
CGCCA Dkt. No. 1025

Michael B. Leaver, U.S. Coast Guard
USCAAF Dkt. No. 95-0909/CG
CGCCA Dkt. No. 946

James A. Leonard, U.S. Coast Guard
USCAAF Dkt. No. 95-0702/CG
CGCCA Dkt. No. 1039

Robert J. Nichols, U.S. Coast Guard
USCAAF Dkt. No. 95-1130/CG
CGCCA Dkt. No. 1045

Donald H. Venable, U.S. Coast Guard
USCAAF Dkt. No. 96-0401/CG
CGCCA Dkt. No. 1053

United States of America

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

No. 96–

JON E. EDMOND, PETITIONER

v.

THE UNITED STATES OF AMERICA, RESPONDENT

AND OTHER CASES

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

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PETITION FOR A WRIT OF CERTIORARI

The petitioners, Jon E. Edmond, *et al.*, respectfully pray that writs of certiorari issue to review the judgments and opinions of the United States Court of Appeals for the Armed Forces entered in these proceedings.

OPINIONS BELOW

The decision on reconsideration of the United States Court of Appeals for the Armed Forces, *United States v.*

Edmond, Dkt. No. 93-1292/CG (C.A.A.F. June 27, 1996) is reprinted as Appendix A at App. 1a. The decision of the United States Court of Appeals for the Armed Forces, *United States v. Edmond*, 41 M.J. 419, *rev'd*, 116 S. Ct. 43 (1995)(summary disposition), is reprinted as Appendix B at App. 2a. The opinion of the United States Coast Guard Court of Military Review, *United States v. Edmond*, 37 M.J. 787 (C.G.C.M.R. 1993), is reprinted as Appendix C at App. 12a.[1]

The order of the United States Court of Appeals for the Armed Forces, *United States v. Lazenby*, Dkt. No. 95-0941/CG (C.A.A.F. May 21, 1996) is reprinted as Appendix D at App. 34a. The opinion of the United States Coast Guard Court of Criminal Appeals, *United States v. Lazenby*, 42 M.J. 702 (C.G. Ct. Crim. App. 1995), is reprinted as Appendix E at App. 35a.

The order of the United States Court of Appeals for the Armed Forces, *United States v. Leaver*, Dkt. No. 95-0909/CG (C.A.A.F. May 21, 1996) is reprinted as Appendix F at App. 44a. The opinion of the United States Coast Guard Court of Criminal Appeals, *United States v. Leaver*, 42 M.J. 599 (C.G. Ct. Crim. App. 1995), is reprinted as Appendix G at App. 45a.

The order of the United States Court of Appeals for the Armed Forces, *United States v. Leonard*, Dkt. No. 95-0702/CG (C.A.A.F. May 21, 1996) is reprinted as Appendix H at App. 48a. The opinion of the United States Coast Guard

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[1] Effective October 5, 1994, the name of the U.S. Court of Military Appeals was changed to the U.S. Court of Appeals for the Armed Forces, and the names of the service Courts of Military Review were changed to the Courts of Criminal Appeals. National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 924, 108 Stat. 2663, 2831 (1994). This petition will use the names as of the dates of the decisions in each case.

Court of Criminal Appeals, *United States v. Leonard*, 41 M.J. 900 (C.G. Ct. Crim. App. 1995), is reprinted as Appendix I at App. 49a.

The order of the United States Court of Appeals for the Armed Forces, *United States v. Nichols*, Dkt. No. 95-1130/CG (C.A.A.F. May 21, 1996) is reprinted as Appendix J at App. 60a. The opinion of the United States Coast Guard Court of Criminal Appeals, *United States v. Nichols*, Dkt. No. 1045 (C.G. Ct. Crim. App. July 14, 1995), is reprinted as Appendix K at App. 61a.

The order of the United States Court of Appeals for the Armed Forces, *United States v. Venable*, Dkt. No. 96-0401/CG (C.A.A.F. May 21, 1996) is reprinted as Appendix L at App. 65a. The opinion of the United States Coast Guard Court of Criminal Appeals, *United States v. Venable*, Dkt. No. 1053 (C.G. Ct. Crim. App. December 7, 1995), is reprinted as Appendix M at App. 66a.

JURISDICTION

The decisions of the Court of Appeals for the Armed Forces were issued on May 21 and June 27, 1996. The jurisdiction of this Court is invoked under Article 67a of the Uniform Code of Military Justice, 10 U.S.C. § 867a (Supp. II 1990) and 28 U.S.C. § 1259(3) (Supp. II 1990).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Appointments Clause, U.S. Const. art. II, § 2, cl. 2, provides:

> [The President] . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint

Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The relevant provision of the Uniform Code of Military Justice, Article 66, 10 U.S.C.A. § 866 (West 1995), provides in pertinent part:

(a) Each Judge Advocate General shall establish a Court of Criminal Appeals which shall be composed of one or more panels, and each such panel shall be composed of not less than three appellate military judges. For the purpose of reviewing court-martial cases, the court may sit in panels or as a whole in accordance with rules prescribed under subsection (f). Any decision of a panel may be reconsidered by the court sitting as a whole in accordance with such rules. Appellate military judges who are assigned to a Court of Criminal Appeals may be commissioned officers or civilians, each of whom must be a member of a bar of a Federal court or of the highest court of a State.

* * *

(c) In a case referred to it, the Court of Criminal Appeals may act only with respect to the findings and sentence as approved by the convening authority. It may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it

may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.

* * *

The relevant provision of Title 49 of the United States Code, 49 U.S.C. § 323(a) (1988), provides:

The Secretary of Transportation may appoint and fix the pay of officers and employees of the Department of Transportation and may prescribe their duties and powers.

STATEMENT OF THE CASE

This is a consolidated petition representing all interested Coast Guard members of varying ranks whose court-martial convictions were affirmed by the Court of Appeals for the Armed Forces on May 21 and June 27, 1996. In each case, the Court of Appeals for the Armed Forces granted review, and rendered adverse summary dispositions in light of *United States v. Ryder*, 44 M.J. 9 (C.A.A.F. 1996). Each case is factually distinct, but the facts critical to a resolution of the issue presented in this petition are identical. Each case involved conviction and sentence by a general or special court-martial. Each case was reviewed in the Coast Guard Court of Criminal Appeals by a panel consisting partially of commissioned officers, and also containing at least one civilian judge. This petition challenges the validity of the appointments of the civilian judges only.

A. Background

Knowledge of three military cases is necessary to a full understanding of the issue presented in this case. Those cases

are *Weiss v. United States*, 114 S. Ct. 752 (1994);*Ryder v. United States*, 115 S. Ct. 2031 (1995); and *United States v. Ryder*, 44 M.J. 9 (1996)

In *Weiss*, this Court affirmed the decision of the Court of Military Appeals which had affirmed the petitioner's conviction. The case involved a contention that the appointments of the military trial and appellate judges who heard and reviewed the petitioner's case had not been made in compliance with the Appointments Clause of the Constitution. *Weiss*, 114 S. Ct. at 754–755. This Court concluded that the Appointments Clause applied to the appointment of military trial and appellate judges, but that appointment as a commissioned officer of the armed forces, with the advice and consent of the Senate, satisfies the Appointments Clause for those judges who are already commissioned officers on active duty. *Weiss*, 114 S. Ct. at 757, 760. However, the Court specifically declined to apply that conclusion to the appointment of civilians to service courts of military review. *Weiss*, 114 S. Ct. at 757 n.4. The Court noted that the "constitutionality of the provision allowing civilians to be assigned to Courts of Military Review, without being appointed pursuant to the Appointments Clause, obviously presents a quite different question. See Art. 66(a), UCMJ, 10 U.S.C. § 866(a). It is not at issue here." *Id.*

On January 15, 1993, after the decision of the Court of Military Appeals in *Weiss*, the Secretary of Transportation signed a memorandum which "adopted" the prior appointments of the Coast Guard Court of Military Review judges as "appointments of [his] own." *See United States v. Carpenter*, 37 M.J. 291, 300 (C.M.A. 1993). This memorandum was prepared and signed by the Secretary upon the suggestion of the judges of the Coast Guard Court of

Military Review. *United States v. Senior*, 36 M.J. 1016, 1018 (C.G.C.M.R. 1993).

In *Carpenter*, the Court of Military Appeals considered the issue of the appointment of civilian Court of Military Review judges. *Carpenter*, 37 M.J. at 293. The court correctly concluded that Chief Judge Baum's appointment to the court of military review was defective because he was a civilian. *Carpenter*, 37 M.J. at 295. However, the court concluded that no relief was necessary, because it afforded *de facto* validity to the acts of the Chief Judge, relying on *Buckley v. Valeo*, 424 U.S. 1 (1976). The court also noted the January 15, 1993, memorandum of the Secretary of Transportation purporting to appoint the judges of the Coast Guard Court of Military Review, including Chief Judge Baum, and suggested that this corrected the violation of the Appointments Clause. *Carpenter*, 37 M.J. at 295 and 294 n.1.

The issue of the propriety of affording *de facto* validity to the acts of unconstitutionally appointed appellate military judges who reviewed a criminal case was addressed by this Court in *Ryder v. United States*, 115 S.Ct. 2031 (1995). This Court concluded that the *de facto* officer doctrine did not apply to the acts of the improperly–appointed civilian judges, at least in cases in which the issue was raised to the court while the case was undergoing direct review by it. This decision required new reviews by the Coast Guard Court with properly–appointed judges for cases still on direct review that were decided before the January 15, 1993, memorandum of the Secretary of Transportation.

Both *Carpenter* and *Ryder* were decided by the Coast Guard Court of Military Review before January 15, 1993. Therefore, the validity of the memorandum of the Secretary of Transportation issued on that date, which purports to appoint the judges of the Coast Guard court, was not at issue,

and the comment in *Carpenter* suggesting its validity was simply dicta.

On remand in *Ryder*, the Court of Appeals for the Armed Forces considered the question of whether the remaining civilian judge of the Coast Guard Court is now properly appointed by the Secretary's action. The court concluded that judges of the Courts of Criminal Appeals are inferior officers of the United States, and that the Secretary of Transportation has the authority to appoint those judges. *Ryder*, 44 M.J. at 11. The court relied on Justice Souter's concurring opinion in *Weiss* for its conclusion that the judges of the Courts of Criminal Appeals are inferior officers. *Id.; Weiss*, 114 S. Ct. at 769 (Souter, J., concurring). The court relied on the general statutory provision permitting the Secretary of Transportation to appoint subordinates in the Department of Transportation for its conclusion that the Secretary had authority to appoint the judges. *Ryder*, 44 M.J. at 11–12; 49 U.S.C. 323(a). As a result, it remanded *Ryder* to a newly constituted (and therefore constitutional) Coast Guard Court of Criminal Appeals to review his conviction.

B. These cases

In each of these cases, the court–martial conviction and sentence was reviewed by a panel of three judges of the Coast Guard Court of Criminal Appeals. Each panel included Chief Judge Baum, a civilian, and two other judges. In *Lazenby* and *Leonard* the panels also included Judge Bridgman, the Coast Guard Court's other civilian judge, who has since retired. The other judges in these cases were active–duty commissioned officers. Each of the court's decisions was issued after January 15, 1993, the date of the Secretary's appointing memorandum. In each case, the Coast Guard court affirmed the conviction and sentence.

On further discretionary appeal to the Court of Appeals for the Armed Forces, the court affirmed the findings and sentence, relying on its recent decision on remand in *Ryder*.

REASONS FOR GRANTING THE WRIT

A. The Issues Presented Are Important.

This case presents an important unanswered question concerning the authority of the Secretary of Transportation to make appointments to the Coast Guard Court of Criminal Appeals. Petitioners contend that the Secretary cannot appoint the judges of the Coast Guard Court because those judges are principal officers who must be appointed by the President with the advice and consent of the Senate. Even if the judges of the Coast Guard Court are inferior officers, the statute relied upon by the government to justify their appointments by the Secretary is inapplicable.

The Coast Guard Court of Criminal Appeals typically decides between twenty and thirty cases each year. *See Annual Report of the Chief Counsel of the U.S. Coast Guard* (FY 1990), *reprinted at* 32 M.J. CXCI, CXCVII (26 cases decided); *Annual Report of the Chief Counsel of the U.S. Coast Guard* (FY 1991), *reprinted at* 34 M.J. CXXXV, CXLII (28 cases decided); *Annual Report of the Chief Counsel of the U.S. Coast Guard* (FY 1992), *reprinted at* 38 M.J. CLXXXV, CXCII (25 cases decided); *Annual Report of the Chief Counsel of the U.S. Coast Guard* (FY 1993), *reprinted at* 39 M.J. CLXXVI, CLXXXIV (22 cases decided). The court will foreseeably continue to do so, with the appointment status of its chief judge (who sits on essentially all cases heard by the court) in doubt. The issue may continue to be raised, both on direct appeal and potentially in collateral

proceedings, until this Court decides the question presented in this petition.

Petitioners acknowledge that there is no conflict in the circuits on the precise question presented, nor is one likely to arise unless a member of the Coast Guard should successfully pursue his claim on *habeas corpus* and create one that way. But the absence of a conflict did not deter this Court from granting review in *Weiss, Ryder,* and, more recently, in *Loving v. United States*, 116 S.Ct. 1737 (1996), where, as here, there is a systemic issue that will continue to arise and potentially affect large numbers of people in the armed forces. In addition, as noted above, the issue in this petition was expressly left open in *Weiss* and the necessity for resolving it was made inevitable by the remand in *Ryder*.

Although the precise question of whether Coast Guard appellate judges are principal or inferior officers will resolve only this group of cases, its resolution will supplement this Court's decision in *Morrison v. Olson*, 487 U.S. 654 (1988), and thus provide further guidance to the lower courts and Congress. Furthermore, the proper application of the principal/inferior officer distinction, and the type of statute needed to satisfy the "by law" requirement in the Appointments Clause, continues to be a source of uncertainty in other contexts. See *Commonwealth of Pennsylvania v. Dept. of Health and Human Services*, 80 F.3rd 796, 801–06 (3rd Cir. 1996). Since there is never likely to be a conflict in the circuits on this particular Appointments Clause issue, the importance of granting review can also be gleaned from a summary of the arguments in opposition to the decision below.

B. The Decision Below is Erroneous

1. The judges of the Courts of Criminal Appeals are principal officers who must be appointed by the President with the Advice and Consent of the Senate.

Petitioners contend that the Secretary's memorandum was not a proper appointment of the judges of the Coast Guard Court because those judges are "principal" officers of the United States who must be appointed by the President with the advice and consent of the Senate. This question has not been directly addressed by this Court.

In a concurring opinion in *Weiss*, Justice Souter alone discussed this issue. 114 S. Ct. at 763–769. He concluded that all military judges are inferior officers. However, Justice Souter recognized that "there is a good deal of force to the argument that military judges, at least those on the Courts of Military Review, are principal officers . . .." *Weiss*, 114 S. Ct. at 769. Justice Scalia, in a separate concurring opinion joined by Justice Thomas, indicated that this subject should not even have been addressed in that case. *Weiss*, 114 S. Ct. at 770 n.*.

Petitioners contend that the functional analysis that was used in *Morrison v. Olson*, 487 U.S. 654–671–673 (1988), to determine whether the independent counsel was a principal or inferior officer should be applied to determine the status of the judges at issue here. Petitioners contend that this analysis, when applied to the intermediate military appellate judges, leads to the conclusion that they are principal officers.

The courts of criminal appeals provide the only appeal of right for military members convicted at courts-martial, and, in effect, are the appeal of last resort for most military

defendants. This review is particularly important given the extraordinarily broad appellate authority of the Courts of Criminal Appeals. These courts exercise all of the traditional powers of appellate courts, as well as an "awesome, plenary, *de novo* power of review[.]" *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990). Thus, a Court of Criminal Appeals "may affirm only such findings of guilty and the sentence as it finds correct in law and fact . . .. [I]t may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact[.]" Art. 66(c), UCMJ, 10 U.S.C. § 866(c). And, absent waiver by an accused, the Courts of Criminal Appeals are required to review all cases in which the death penalty, confinement for one year or more, a dismissal, or a dishonorable or bad-conduct discharge is part of the approved sentence. Art. 66(b), UCMJ, 10 U.S.C. § 866(b).

Furthermore, if the judges of the Courts of Criminal Appeals are inferior officers, who are their superiors? The services, indeed the United States itself, is bound to carry out the courts' decisions unless reversed or modified in some way by a superior court. *See* Arts. 66(c), 75, UCMJ. The decisions of the Courts of Criminal Appeals, in the vast majority of cases, are subject to review only upon the grant of a petition for grant of review by the Court of Appeals for the Armed Forces. Art. 67(a), UCMJ, 10 U.S.C. § 867(a). Only a small portion of cases in which petitions for review are filed are actually reviewed by the Court of Appeals. *See Annual Report of the U.S. Court of Military Appeals* (FY 1991), *reprinted at* 34 M.J. LXIII, LXXVII (1,811 petitions for grant of review filed, 151 (8.3%) granted); *Annual Report of the U.S. Court of Military Appeals* (FY 1992), *reprinted at* 38 M.J. CXXI, CXXXIII (1,283 petitions for grant of review filed, 182 (14.2%) granted). Other than its power of higher review, the Court of Appeals for the Armed Forces does not

exercise routine supervisory authority over the Courts of Criminal Appeals like Department Heads do over those who work for them.

This Court should review these cases to make it clear that the broad power and authority of these judges are those of a principal officer of the United States. Principal officers must be appointed by the President, with the advice and consent of the Senate. U.S. Const., art. II, § 2, cl. 2. Thus, the appointment by the Secretary of Transportation is not valid.

2. Even if the judges of the Courts of Criminal Appeals are inferior officers, the Secretary of Transportation does not have the statutory authority to appoint them.

The Appointments Clause of the Constitution permits heads of departments to appoint inferior officers only when Congress has so permitted "by Law." U.S. Const. art. II, § 2, cl. 2. If Congress does not specifically, by law, vest the power to appoint inferior officers to a specific office, then those officers fall into the category of "all other officers of the United States, whose Appointments are not herein otherwise provided for . . .." *Id*. Under the Appointments Clause, the authority to make those appointments would then fall to the President, with the advice and consent of the Senate. Similarly, if Congress provides by law for the appointment of an officer, but does so in an unconstitutional manner, that provision has no effect, and the residual appointment power of the President, with the advice and consent of the Senate, applies. *Id*.; *Appointment of Assistant Assessors of Internal Revenue*, 11 Op. Att'y Gen. 209 (1865). There is no inherent authority in the head of a department to make appointments of officers in the department. *United States v. Perkins*, 116 U.S. 483 (1886).

Therefore, the Secretary of Transportation cannot rely upon any inherent authority as the head of the department to appoint the judges of the Coast Guard Court of Criminal Appeals. Statutory authority is required, and it must be reasonably specific. *See Cain v. United States*, 73 F. Supp. 1019, 1021 (N.D.Ill. 1947).

The statute relied upon by the Government to support the Secretary's appointments here, 49 U.S.C. § 323(a), is not specific, but quite general.[2] By its terms, it would appear to permit the Secretary of Transportation to appoint *all* other officers of the department. Even appointment of other principal officers of the Department is not excluded, and would apparently be permitted by this statute. However, this would clearly be a violation of the Appointments Clause.

The impropriety of using the statute for the appointments at issue here is also apparent when one considers the several other statutory provisions that relate to appointments of other inferior officers of the department. For example, 49 U.S.C. § 102(e) permits the Secretary to appoint the Assistant Secretary for Administration; 49 U.S.C. § 104(b)(2) permits the Secretary to appoint the Deputy Federal Highway Administrator; 49 U.S.C. § 104(b)(3) permits the Secretary to appoint the Assistant Administrator of the Federal Highway Administration; 49 U.S.C. § 105(b) permits the Secretary to appoint the Deputy Administrator of the National Highway Traffic Safety Administration. None of these provisions would be necessary if 49 U.S.C. § 323(a) were read literally.

Therefore, there must be an implied, common sense exception in 49 U.S.C. § 323(a); specifically, the statute does

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[2] The Secretary's appointing memorandum itself refers to no legal authority whatsoever for the Secretary's action. *Carpenter*, 37 M.J. at 300. However, 49 U.S.C. § 323(a) has been relied upon by the government and the Court of Appeals for the Armed Forces. *Ryder*, 44 M.J. at 11.

not apply if the appointment of an officer is otherwise provided for by law. But, the authority to appoint appellate military judges is otherwise provided for by law. Art. 66(a), UCMJ, 10 U.S.C. § 866(a). However, that specific provision is unconstitutional, at least as applied to the appointment of civilians. *Carpenter*, 37 M.J. at 294. As indicated above, when Congress fails to specify how an officer is to be appointed, or provides for appointment in an unconstitutional manner, the method of appointment must be made by the President with the advice and consent of the Senate.

Furthermore, Petitioners contend that the memorandum of the Secretary is of no effect because the well-settled rule of statutory interpretation is that, if two statutory provisions deal with the same subject, one is general in its application and the other specific, and the two provisions are in conflict, the specific provision is to be applied. *Busic v. United States*, 446 U.S. 398, 406 (1980). That is exactly the situation involved here. The two statutes in question are Art. 66(a), UCMJ, 10 U.S.C. § 866(a), and 49 U.S.C. § 323(a). Both statutory provisions concern, at least in part, the appointment of officers of the United States within the Department of Transportation. One provision is general and one specific in terms of appointment of officers. Article 66(a), UCMJ, is specific in that it addresses only the appointment of the judges of the Courts of Criminal Appeals; 49 U.S.C. § 323(a) is general in that it addresses the appointment powers of the Secretary generally, department-wide. The two provisions are in conflict. In Art. 66(a), UCMJ, Congress directed the service Judge Advocate General to appoint the judges of the service Court of Criminal Appeals. In 49 U.S.C. § 323(a), Congress authorized the Secretary of Transportation to appoint officers of the department generally, not specifically naming any particular officers or positions. Therefore, it is

clear that the rules of statutory interpretation and application require that the specific provision, Art. 66(a), UCMJ, be given effect over the general provision, 49 U.S.C. § 323(a). Thus, Congress gave the power to appoint the judges of the Coast Guard Court of Criminal Appeals to the Judge Advocate General, and not to the Secretary.

Finally, the last clause in 49 U.S.C. §323(a) confirms the interpretation urged by petitioners -- that the entire provision does not apply when Congress has otherwise specifically spoken on the issue. That final clause permits the Secretary, with respect to those officers and employees whom he is authorized to appoint and to fix their pay, to "prescribe their duties and powers." If the Government is correct that section 323(a) applies to the Coast Guard Court of Criminal Appeals, then the Secretary also may alter the duties of the civilian judges that he appoints and, by the same token, appoint the military judges and alter their powers and duties also, despite the clear mandates of Art. 66, UCMJ. And, presumably, he could also change the duties and the pay for the other statutory officers in the Department noted on page 14, *supra*. There is, however, nothing in section 323(a) that gives a hint that Congress intended to confer such sweeping authority in what is essentially a housekeeping measure.

Because the decision below is so plainly in error, and because it would allow the Secretary (and perhaps other department heads with similarly broad residual appointment powers) to override specific appointment decisions made elsewhere by Congress, this Court should grant review.

CONCLUSION

For the reasons stated, petitioner prays that this Court grant review of the two questions presented.

Respectfully submitted,

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August 1996

APPENDIX A

UNITED STATES COURT OF
APPEALS FOR THE ARMED FORCES

USCA Dkt. No. 93-1292/CG
Crim. App. No. 999

United States, Appellee

v.

Jon E. Edmond, (459-31-5670), Appellant

ORDER

On consideration of appellee's petition for reconsideration of the order of the Court issued on May 21, 1996, it is, by the Court this 27th day of June, 1996,

ORDERED:

That said petition is hereby granted;

That the order of the Court issued on May 21, 1996 is vacated; and

That the decision of the United States Coast Guard Court of Military Review is affirmed.

For the Court,

/s/
John A. Cutts, III
Deputy Clerk of the Court

APPENDIX B

UNITED STATES, Appellee

v.

Jon E. Edmond
Fire Control Technician Third Class, U.S. Coast Guard

No. 93-1292

CMR No. 999

UNITED STATES COURT OF
APPEALS FOR THE ARMED FORCES

Argued October 6, 1994

Decided February 28, 1995

[41 M.J. 419]

For Appellant: *Lieutenant Commander Allen Lotz* (argued).
For Appellee: *Lieutenant John f. Koeppen* (argued).
Military Judge: Douglas F. Smith

Opinion of the Court

CRAWFORD, Judge:

1. Contrary to his pleas, appellant was convicted of being an accessory after the fact to attempted sodomy, 3 bad-check offenses, and committing an indecent act, in violation of Articles 78 and 134, Uniform Code of Military Justice, 10 USC §§ 878 and 934, respectively. The convening authority

approved the sentence of a bad-conduct discharge, confinement for 1 year, total forfeitures, and reduction to the lowest enlisted grade. The Court of Military Review affirmed the findings and the sentence. 37 M.J. 787 (1993).

GRANTED ISSUE[1]

WHETHER THE MILITARY JUDGE ERRED BY FAILING TO DISMISS ALL CHARGES WITH PREJUDICE DUE TO LACK OF A SPEEDY TRIAL

2. We hold the military judge did not abuse his discretion in failing to dismiss all charges with prejudice due to lack of speedy trial under RCM 707, Manual for Courts-Martial, United States, 1984 (Change 5).

3. On the evening of March 1, 1990, eight members of the United States Coast Guard Cutter HAMILTON, including appellant, rented a room at the Red Roof Inn in Philadelphia, Pennsylvania, for a going-away party for a fellow Coast Guardsman who was being transferred. The HAMILTON was undergoing repair work in Philadelphia. The group consisted of seven men and one woman, the woman being Seaman L. She became intoxicated after consuming almost a fifth of liquor. Several members of the group, including appellant, took advantage of her condition to engage in acts of sexual misconduct. The witnesses to these events both at the party and afterwards were in Philadelphia on temporary duty from various parts of the country, including Hawaii, Washington State, Oklahoma, New Jersey, Massachusetts,

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[1] We also granted review of 2 other issues, 39 M.J. 428 (1994), which have been disposed of by *United States v. Carpenter*, 37 M.J. 291 (CMA 1993), *cert. granted sub nom. Ryder v. United States*, 63 U.S.L.W. 3498 (Jan. 6, 1995)(No. 94-431).

Virginia, as well as members of the HAMILTON, which was en route to its new homeport in Long Beach, California, from June 21 to July 25, 1991.

4. On June 25, 1991, charges were preferred against appellant for the following offenses:

(1) conspiring with Yeoman Martin R. Trujillo, Seaman Jose M. Collazo, and Seaman Charles A. Hokoana to rape, sodomize, and indecently assault Yeoman L.;

(2) conspiracy to obstruct justice by hindering the investigation of the rape, sodomy, and indecent assault of L;

(3) making a false official statement to Special Agent R. A. Carreiro that no one made any sexual advances against L at the Red Roof Inn in Philadelphia, Pennsylvania, on or about March 1, 1990;

(4) rape of L;

(5) forcible sodomy of L;

(6) indecent assault of L by inserting his finger into her vagina; and

(7) indecent assault of L by biting her about the neck, breast, and thighs.

5. Prior to arraignment (1), (4), and (5) were dismissed. Two accessory-after-the-fact specifications were added on November 18, 1991.

6. After an Article 39(a), UCMJ, 10 USC @ 839(a), session, the military judge on December 21 dismissed without prejudice the aforementioned charges and specifications preferred on June 25, 1991, against appellant because of a denial of a right to speedy trial as set forth in RCM 707. On December 27, 1991, additional charges were preferred against appellant for conspiracy to obstruct justice, making a false official statement, and indecent assault.

7. On February 7, 1992, another Additional Charge and 3 specifications of uttering bad checks were preferred; on March 13, 1992, a fifth Additional Charge and its specification were preferred alleging commission of an indecent act upon Seaman L. Appellant alleges that the indecent-act charge is in effect very similar to the indecent-assault charge which was dismissed without prejudice, Final Brief at 3, and we will treat it accordingly.

8. The prejudice alleged by the accused on appeal is that he was disenrolled from a service school, denied access to classified material, and was under great stress. Final Brief at 7.

DISCUSSION

9. While articulating an "abuse of discretion" standard in *United States v. Taylor*, 487 U.S. 326, 335 ¶12, 101 L. Ed. 2d 297, 108 S. Ct. 2413 (1988), the Supreme Court stated that "discretionary choices are not left to a court's 'inclination, but to its judgment; and its judgment is to be guided by sound legal principles.'" *Id.* at 336 ¶13. The Court continued: "Whether discretion has been abused depends, of course, on the bounds of that discretion and the principles that guide its exercise.... Factual findings of a district court are, of course, entitled to substantial deference and will be reversed only for clear error." *Id.* at 336 ¶14 and 337 ¶16. But the appellate court is to apply the "particular factors" set forth in the statute. *Id.* at 336-37 ¶15.

10. The Speedy Trial Act (18 USC §§ 3161-62) requires a reviewing court to undertake "substantive scrutiny to ensure that the judgment is supported in terms of the factors identified in the statute." In assessing these factors, "the district court's judgment of how opposing considerations balance should not lightly be disturbed." 487 U.S. at 337 ¶16.

11. RCM 707 was based on ABA Standards, Speedy Trial (1978), *see* Drafters' Analysis, Manual, *supra* at A21-36, and is generally similar to 18 USC §§ 3161-62. The Rule was designed to ensure speedy-trial protections in addition to those granted by the Sixth Amendment, Due Process Clause of the Fifth Amendment, and Article 10, UCMJ, 10 USC § 810. *United States v. Vogan*, 35 M.J. 32, 33 ¶5 (CMA 1992). In *United States v. Kossman*, 38 M.J. 258, 262 ¶21 (CMA 1993), relying on Article 10, we set forth a "reasonable diligence" standard, citing *United States v. Tibbs*, 15 USCMA 350, 353, 35 CMR 322, 325 ¶8 (1965). But *Kossman* is not applicable here because there was no pretrial restraint of appellant.

12. This case marks the first time this Court has addressed the 1991 change to RCM 707 allowing dismissal without prejudice. That version of RCM 707(d) provides:

> A failure to comply with the right to a speedy trial will result in dismissal of the affected charges. This dismissal will be with or without prejudice to the government's right to reinstitute court-martial proceedings against the accused for the same offense at a later date. The charges must be dismissed with prejudice where the accused has been deprived of his or her constitutional right to a speedy trial. In determining whether to dismiss charges with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case that lead to dismissal; the impact of a reprosecution on the administration of justice; and any prejudice to the accused resulting from the denial of a speedy trial.

13. This provision is similar to 18 USC § 3162(a)(2) of the Federal Speedy Trial Act, which reads:

> In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice....

14. One of the differences between the Speedy Trial Act and RCM 707 is that the factor of "prejudice to the accused resulting from the denial of a speedy trial" set out in the Rule is not enumerated in the Speedy Trial Act. However, in *United States v. Taylor*, 487 U.S. at 333-34 ¶10, the Court pointed out that the legislative history reveals that prejudice to the accused is a factor to be taken into account.

15. In assessing whether there has been a violation of the Sixth Amendment right to a speedy trial, courts examine the "length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Barker v. Wingo*, 407 U.S. 514, 530 ¶24, 33 L. Ed. 2d 101, 92 S. Ct. 2182 (1972). In contrast to the Speedy Trial Act, RCM 707(d) explicitly provides that if the judge does find a violation of the Sixth Amendment right to a speedy trial, the sole remedy is dismissal. *See United States v. Strunk*, 412 U.S. 434, 37 L. Ed. 2d 56, 93 S. Ct. 2260 (1973). Neither the dismissal with prejudice nor without prejudice has a "priority" in the Speedy Trial Act. *United States v. Taylor*, 487 U.S. at 334 ¶11

16. In determining whether the motion should have been granted with prejudice, the Supreme Court announced that it would examine the following factors: "truly neglectful" government "attitudes"; intentional versus "isolated unwitting violations"; excuses for the delay; and responsibility for the delay. *Id.* at 338-39 ¶18. The Federal Courts have looked at

similar factors, such as "intentional dilatory conduct," *United States v. Kottmyer*, 961 F.2d 569, 573 ¶18 (6th Cir. 1992); a "pattern of neglect," *id.* at 573 ¶18 and *United States v. Giambrone*, 920 F.2d 176, 182 (2d Cir. 1990); and simple inadvertence, *United States v. Wright*, 303 U.S. App. D.C. 352, 6 F.3d 811, 814 ¶12 (D.C. Cir. 1993).

17. A review of the record reveals that the 176-day delay in this case was not due to "intentional dilatory conduct" on the part of the Government. After the party at the Red Roof Inn, the witnesses and suspects were spread throughout the world, including California, Hawaii, Oklahoma, and many places on the East Coast. In fact, prior to preferral of charges appellant's ship sailed from Boston to Long Beach, California, making potential witnesses and the co-accuseds unavailable. Twenty-eight days of the delay were due to finding a "suitable" investigating officer for a multi-party Article 32, UCMJ, 10 USC § 832, investigation. This involved contacting 7 different Coast Guard legal offices to find an Article 32 investigating officer. Another delay between August 26 and September 19, 1991, was to await the trials of the co-accused to obtain further evidence for appellant's trial. Certainly it is reasonable for the Government to decide in which order defendants will be tried. *Cf. United States v. Facey*, 26 M.J. 421 (CMA 1988); *United States v. Grom*, 21 M.J. 53, 57 ¶14 (CMA 1985), *cert. denied*, 475 U.S. 1083, 89 L. Ed. 2d 718, 106 S. Ct. 1462 (1986).

18. Appellant demanded a speedy trial on August 27, 1991, after a multi-party Article 32 investigation. The military judge evaluated the seriousness of the offenses; the facts and circumstances surrounding the request for dismissal; the reasons for the delays; and the prejudice to the accused. He found very little prejudice to appellant, *i.e.*,

disenrollment from school, inability to work due to withdrawal of his security clearance, and possible stress. There was no indication of the slightest impact on the right to a fair trial.

19. Based on these facts, we hold that the military judge did not abuse his discretion in failing to dismiss the charges with prejudice.

The decision of the United States Coast Guard Court of Military Review is affirmed.

Chief Judge SULLIVAN and Judges COX and GIERKE concur.

WISS, Judge (concurring in the result):

20. The majority asserts: "A review of the record reveals that the 176-day delay in this case was not due to 'intentional dilatory conduct' on the part of the Government." 41 M.J. at 422. It then notes that this record reveals that there was difficulty in contacting potential witnesses and co-accuseds who had "spread throughout the world" after the party; difficulty in finding a suitable Article 32, Uniform Code of Military Justice, 10 USC § 832, officer; and the need to obtain further evidence for appellant's trial by waiting for the trial of co-accused. My own review of the record, however, does not support the implication that such facially understandable explanations caused the delay here, so I cannot join in the majority opinion.

21. The party at which these offenses allegedly occurred was on *March 1, 1990*, in Philadelphia, where the revelers' ship was in overhaul. Investigation of this event began at least as early as April 1990. On June 21, 1991, nearly 16 months after the party, the ship left the east coast, and it arrived at its new homeport of Long Beach, California, on

July 25, 1991. The original charges had been preferred against appellant, in the interim, on June 25, 1991, thereby starting the 120-day clock of RCM 707(a)(1), Manual for Courts-Martial, United States, 1984.

22. On *September 9, 1991*, the Government asked for and received the convening authority's retroactive excusal for delay since June 25. The military judge, however, ruled that excusing this delay was an abuse of the convening authority's discretion in violation of RCM 707(c), which only provides for "prospective grants of pretrial delay" in all cases tried after July 6, 1991. Exec. Order No. 12767, 56 Fed. Reg. 30299 (1991). *See United States v. Carlisle*, 25 M.J. 426 (CMA 1988). As well, this request and grant of excusal was *ex parte*--another violation of RCM 707 found by the military judge. *See United States v. Duncan*, 38 M.J. 476, 479 ¶ 15 (CMA 1993).

23. It was during this period of delay that the alleged difficulties arose to which the majority points. Upon a closer look, however, those difficulties do not appear to have been so overwhelming. As mentioned earlier, the investigation into the events at the party had begun in April 1990; in fact, the Government had given immunity to one of the attendees and had interviewed him in November 1990. Further, the witnesses and co-accused numbered only a total of eight, and all were servicemembers. In this context, it is not readily apparent that the task of locating and interviewing these eight people was so imposing, as the majority implies. As to the tactical decision to try appellant after 2 of his co-accused, I note simply that neither testified at appellant's court-martial when it finally took place in March 1992.[2]

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[2] The military judge dismissed the relevant charges without prejudice to the Government to renew them in December 1991. Ironically, then,

24. Thus, the delay from *September 23 until November 18, 1991*, is wholly unexplained; the prosecutor simply asserted that he believed that the convening authority had relieved the Government of accountability for 91 days of delay on September 9 (77 days as of that date and 14 more prospectively)--the implication being that trial counsel believed (erroneously, it turned out) that he had time to burn.

25. Accordingly, far from being a picture of orderly process interrupted only by reasonable and understandable difficulties, as painted by the majority, this case is a not pretty picture of a lackadaisical approach to military justice. I do not dissent from the majority's disposition here only because appellant is unable to point convincingly to substantial prejudice suffered as a result. *See* RCM 707(d); *United States v. Grom*, 21 M.J. 53, 57 ¶¶ 16-17 (CMA 1985), *cert. denied*, 475 U.S. 1083, 89 L. Ed. 2d 718, 106 S. Ct. 1462 (1986). The Government has dodged a bullet.

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[2] Cont. appellant's motion to dismiss charges due to unreasonable pretrial delay only resulted in 3 more months of delay.

APPENDIX C

UNITED STATES COAST GUARD
COURT OF MILITARY REVIEW

Washington, DC

UNITED STATES

v.

Jon E. Edmond
Fire Control Technician Third Class, U.S. Coast Guard

CGCM 0063

Docket No. 999

25 June 1993

[37 M.J. 787]

General Court-Martial convened by Commander, U.S. Coast Guard Maintenance and Logistics Command Pacific, Alameda, California. Tried at the Office of the Commander, Maintenance and Logistics Command Pacific, Alameda, California, on 18 December 1991, and 23-27 March 1992.

Military Judge: CAPT Douglas A. Smith, USCG
Trial Counsel: LCDR C. H. Allen, USCG
Detailed Defense Counsel: CAPT G.J.D. Dean, USMC
Assistant Defense Counsel: LT J. R. James, JAGC, USNR
Appellate Defense Counsel: LCDR Allen Lotz, USCG
Appellate Government Counsel: LT Garland M. Walker, USCGR

BEFORE
PANEL FOUR
BAUM, BASTEK, AND EDWARDS
Appellate Military Judges

Edwards, Judge:

Contrary to his pleas, Appellant was convicted by officer and enlisted members of being an accessory after the fact to an attempted sodomy committed by a shipmate, committing an indecent act with a different shipmate, and dishonorably failing to maintain sufficient funds in his checking account to honor each of three personal checks, in violation of Articles 78 and 134, Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. §§ 878 and 934 (Supp. II 1990). The convening authority approved the adjudged sentence of reduction to pay grade E-1, forfeiture of all pay and allowances, confinement for one year, and a bad conduct discharge.

Appellant submits ten assignments of error, six of which merit discussion. Those six follow: Assignment I asserts that the Military Judge erred in not dismissing all charges with prejudice for lack of a speedy trial. Assignment II asserts that the Military Judge erred in denying a defense motion which sought his disqualification. Assignment III asserts that the Military Judge erred in refusing to dismiss Additional Charge V and its specification (indecent act with another), when it was multiplicious for pleading purposes with Additional Charge III and its specification (indecent assault). Assignment IV asserts that the three specifications of failing to maintain sufficient funds fail to state offenses. Assignment V asserts that the Military Judge erred in admitting irrelevant evidence of the post-offense status of Appellant's checking account. Assignment VI asserts that the evidence was not

sufficient to prove beyond a reasonable doubt that Appellant was guilty of dishonorably failing to maintain sufficient funds in his checking account.

The case having been fully briefed and argued, we now affirm.

I.

FACTS

The most serious charges arose from an incident which occurred on 1 March 1990. Appellant was assigned to USCGC HAMILTON (WHEC-715), which was undergoing a period of yard availability in Philadelphia, Pennsylvania. A going-away party was held in a local motel for one of Appellant's shipmates who was being transferred. During the party, Seaman (SN) L, a woman who served with Appellant in the cutter's deck force, consumed so much alcohol that she became quite ill. Several of the party-goers, including Appellant, took advantage of SN L's inebriated and sickened condition to engage in acts of sexual misconduct. Ultimately, the incident came to the attention of Coast Guard authorities, was investigated, and led to charges. Following dismissal of most of the charges by the Military Judge at the initial session of Appellant's trial, see Part II infra, Appellant issued three personal checks which were dishonored and thereafter served as the basis for an additional charge when the trial reconvened.

II.

SPEEDY TRIAL

Charges under Articles 81, 107, 120, 125, and 134, UCMJ, initially were preferred against Appellant on 25 June

1991, and he was informed of them on 5 July 1991. *See* Rules for Courts-Martial [hereinafter R.C.M.] 308. No pretrial restraint, R.C.M. 304, was imposed. An additional charge under Article 78, UCMJ, containing two specifications, was preferred on 18 November 1991. An Article 32, UCMJ, hearing was conducted on 18 and 19 November 1991. Thereafter, the Convening Authority referred charges under Articles 78, 81, 107, and 134, UCMJ, to a general court-martial. Trial commenced on 18 December 1991. Prior to arraignment,[1] Appellant moved to

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[1] R.C.M. 904 provides, in pertinent part, that arraignment "shall consist of reading the charges and specifications to the accused and calling on the accused to plead. The accused may waive the reading." The Discussion following R.C.M. 904 notes that "arraignment is complete when the accused is called upon to plead; the entry of pleas is not part of the arraignment."

During the first session of Appellant's trial on 18 December 1991, the Military Judge stated to Appellant:

> Now Petty Officer Edmond, I'm about to ask you how you plead to the Charges and Specifications. However before receiving pleas, I must advise you that any motions to dismiss any charge or to grant any other relief should be made at this time. I understand that Captain Dean [Detailed Defense Counsel] has several motions to make at this point. You may proceed.

Record at 20.

Thereafter, motions were made and argued extensively. However, Appellant never actually was asked to plead nor did he do so on that date. Accordingly, there was no arraignment on 18 December 1991.

Trial reconvened on 23 March 1992. In the meantime, as discussed infra, the Military Judge had dismissed the charges under Articles 81, 107, 120, 125, and 134, which were the ones preferred on 25 June 1991. The additional charge under Article 78, UCMJ, which had been preferred on 18 November 1991, was not affected. New charges had been preferred and referred to the same court-martial. The Military Judge correctly

dismiss all of the charges on the basis of denial of his right to a speedy trial.

In his Essential Findings and Ruling on Speedy Trial Motion, dated 21 December 1991, the Military Judge found the government accountable for 161 days of the 176 days which had elapsed since charges originally had been preferred on 25 June 1991. Accordingly, he also found that the government had violated R.C.M. 707(a)(1), which provides that an accused is to be brought to trial within 120 days of the preferral of charges. He did not find a violation of Appellant's right to a speedy trial under either the Sixth Amendment to the Federal Constitution or Article 10, UCMJ. Pursuant to R.C.M. 707(d), the Military Judge dismissed the charges preferred on 25 June 1991 (Articles 81, 107, 120, 125, and 134, UCMJ), without prejudice to the government's right to reinstitute proceedings against Appellant for the same offenses. He denied that portion of the motion seeking dismissal of the additional charge under Article 78, UCMJ.

Appellant argues first that the Military Judge should have dismissed the additional charge under Article 78, UCMJ,

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[1] Cont. explained to Appellant that he could not be tried on the new charges without his consent. See R.C.M. 601(e)(2). Appellant so consented and was arraigned properly on all of the charges, including the charge under Article 78, UCMJ.

Between 18 November 1991 and Appellant's arraignment on 23 March 1992, 126 days elapsed. As he had not been arraigned at the 18 December 1991 trial session, a motion for dismissal of the Article 78, UCMJ, charge might have been made by Appellant under R.C.M. 707(a)(1) and 707(b)(1). None was. It appears that no one realized that Appellant had not been arraigned at the session on 18 December 1991, and that all parties acted as though he had pled not guilty. In any event, while not condoning the failure to hold a proper arraignment, we find that Appellant has waived this issue. R.C.M. 905(e) and 907(b)(2).

because the government had the information necessary to prefer that charge when he was charged with the other offenses on 21 June 1991. Appellant cites *United States v. Boden*, 21 M.J. 916 (A.C.M.R. 1986), and *United States v. Honican*, 27 M.J. 590 (A.C.M.R. 1988), in support of his position. Both *Boden* and *Honican* are inapposite. In each, the accused was in pretrial confinement for other offenses when an additional charge was preferred. Under the version of R.C.M. 707(d) then in effect and *United States v. Burton*, 21 U.S.C.M.A. 112, 44 C.M.R. 166 (1971), the Army Court of Military Review held that, as a consequence of being in pretrial confinement, the 90-day period for bringing the accused to trial on the additional charge began when the government possessed "substantial information on which to base preferral of that charge." *United States v. Boden*, 21 M.J. at 918. Unlike either of the accused in *Boden* and *Honican*, Appellant in this case never was placed in pretrial confinement. Accordingly, the condition predicate for starting the speedy trial clock, i.e., substantial information *while Appellant was in pretrial confinement*, never was satisfied.

Appellant next contends that, in dismissing the 21 June 1991 charges without prejudice, rather than with prejudice, the Military Judge abused his discretion because he did not weigh properly the factors listed in R.C.M. 707(d). Appellant also contends that, in any event, the lack of a speedy trial violated his Sixth Amendment rights.

Both the government and Appellant agree that the current version of R.C.M. 707 applies. It was included in Executive Order 12767 issued by the President on 27 June 1991 and published at 56 Fed. Reg. 30284, which subsequently was published as Change No. 5 to the Manual for Courts-Martial, United States 1984 [hereinafter MCM] on

15 November 1991. Section 4.d. of the Executive Order provides that the amended R.C.M. 707 was to apply "only to cases in which arraignment occurs on or after 6 July 1991." As arraignment occurred on 23 March 1992, *see* n.1 *supra*, we also agree that the current version applies.

R.C.M. 707(d) now provides:

> Remedy. A failure to comply with the right to a speedy trial will result in dismissal of the affected charges. This dismissal will be with or without prejudice to the government's right to reinstitute court-martial proceedings against the accused for the same offense at a later date. The charges must be dismissed with prejudice where the accused has been deprived of his or her constitutional right to a speedy trial. In determining whether to dismiss charges with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case that lead to dismissal; the impact of a reprosecution on the administration of justice; and any prejudice to the accused resulting from the denial of a speedy trial.

Recognizing that, if he found a violation of Appellant's constitutional right to a speedy trial, he would have no alternative but to dismiss with prejudice any of the affected charges, the Military Judge first conducted a "Sixth Amendment Speedy Trial" analysis. Citing *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972), *United States v. Grom*, 21 M.J. 53 (C.M.A. 1985), and *United States v. Johnson*, 17 M.J. 255 (C.M.A. 1984), the Military Judge addressed four factors, *viz.*, length of delay, reason for delay, Appellant's assertion of his right to a speedy trial, and prejudice to Appellant.

The Military Judge found the length of delay, 176 days, while beyond the 120-day standard of R.C.M. 707, to be

"within the 'neutral' range for determining a 6th Amendment speedy trial violation."

With respect to reasons for delay, the government offered several, including unavailability of witnesses due to a coast-to-coast change of homeport of Appellant's cutter and the earlier trial of two co-accused in order to make them available to testify at Appellant's trial. Additionally, consistent with past practice under the former version of R.C.M. 707, the Convening Authority had authorized several periods of pretrial delay, but did so retroactively. The Military Judge ruled that the current version of R.C.M. 707(c) precludes retroactive approval of periods of delay. Nevertheless, he found no bad faith on the part of government counsel because "this issue was not clearly settled" when the government counsel obtained retroactive approval for periods of delay from the Convening Authority. Accordingly, the Military Judge found that this factor "weighed in favor of the government in [his] balancing."

Appellant did demand a speedy trial on 27 August 1991 and the Military Judge found this factor to favor Appellant's position.

Finally, with respect to the fourth factor, prejudice to Appellant, the Military Judge found only "slight" prejudice, because Appellant had not been restrained in any fashion, there was no evidence that his defense had been hindered by the delay, he had continued to receive pay and allowances, and there was no significant evidence that Appellant's anxiety or stress exceeded that of any other accused facing similar charges. Appellant's security clearance had been withdrawn, but he had been allowed to perform the normal duties of a person in his rating who had lost such a clearance.

Upon weighing all of these factors, the Military Judge "[found] them less compelling than the factors evaluated by

the Court of Military Appeals in [*United States v. Grom, supra*], where the court held that there was no denial of the 6th Amendment right to a speedy trial." Accordingly, the Military Judge found no Sixth Amendment violation.

We concur with the Military Judge's reasoning and his conclusion. Applying the abuse of discretion standard of *United States v. Travers*, 25 M.J. 61 (C.M.A. 1987), we find that he did not abuse his discretion in denying that portion of Appellant's speedy trial motion seeking dismissal under the Sixth Amendment.

Turning to the issue of dismissal with or without prejudice, we note that the Military Judge's essential findings also addressed each of the four specially listed factors in R.C.M. 707(d). With respect to the first, seriousness of the offenses, the Military Judge found that Appellant had been charged with what clearly were serious offenses. As to the second, the facts and circumstances of the case that led to dismissal, the Military Judge found no evidence of intentional government noncompliance with R.C.M. 707, but instead a "good faith, though misguided, reliance on an erroneous interpretation of [the] 'new' RCM 707." With respect to the third factor, the impact of a reprosecution on the administration of justice, the Military Judge found this to be "neutral," since dismissal with prejudice would not have contributed to a better or fairer administration of military justice within the Coast Guard. Finally, the Military Judge found that the fourth factor, prejudice to the accused, favored dismissal without prejudice since Appellant had not been harmed by the 41-day length of the R.C.M. 707 violation. Again, we find that the Military Judge did not abuse his discretion in deciding to dismiss without prejudice.

III.

DISQUALIFICATION OF THE MILITARY JUDGE

Appellant asserts that, pursuant to R.C.M. 902(a) and (b)(1), the Military Judge should have recused himself in order to avoid the "appearance of impartiality" (sic), because he had served as the military judge in the courts-martial of three of Appellant's co-accused.

At trial, Appellant twice challenged the Military Judge for cause, at the initial session on 18 December 1991, and the second session on 23 March 1992. In both instances the Military Judge denied the challenge. He explained that he had no knowledge of any of the facts concerning any of the accused except that which was gained during his participation in their earlier trials. Anything which he had heard in a prior case he always disregarded in a subsequent trial, and he intended to do the same in Appellant's trial. Finally, the Military Judge stated that any determination he might make with respect to Appellant would be based entirely upon evidence presented at his own trial.

Appellant argues for reversal because of the Military Judge's acceptance of a guilty plea by one of Appellant's co-accused to a charge of accessory after the fact to indecent assault by Appellant, and because of the "chilling effect" upon that same co-accused's testimony purportedly caused by the presence on the bench of the same military judge who had tried that co-accused.

The facts in this case most closely resemble those found in *United States v. Oakley*, 33 M.J. 27 (C.M.A. 1991). In *Oakley*, the military judge presided at a trial with members after he previously had presided at the trials of two of the accused's "alleged cohorts." *Id.* at 33. One had pled guilty in a trial by military judge alone, and the other had pled guilty in a trial with members. The Court of Military Appeals held that the military judge was not required to recuse himself

where there was no "affirmative indication in the record that [the accused] would have withdrawn that request [for trial with members] if his recusal motion had been granted," *id.* at 34, the military judge's findings in the earlier trials were based upon evidence presented solely in those trials, and the military judge clearly demonstrated his intention and ability to disregard that other evidence and rely strictly upon evidence presented in the accused's trial.

With respect to forum, during voir dire of the Military Judge at the initial trial session, he asked Detailed Defense Counsel whether Appellant was considering trial by military judge alone. Defense Counsel declined to answer the question at that time. After the challenge against the Military Judge had been denied the first time, Appellant elected trial with members. Neither Appellant nor Detailed Defense Counsel made any statement to the effect that the denial of the challenge had led to the decision to go forward with members. Accordingly, as in *Oakley*, there does not appear to be any basis for concluding that the denial of the challenge to the Military Judge for cause had any effect on Appellant's choice of forum.[2]

We also conclude that there is no basis for finding that the Military Judge was any less than completely forthright in stating his belief that he could hear Appellant's case fairly and without regard to the earlier trials. This clearly is not a case in which the Military Judge had "formed an intractable opinion as to the guilt of the accused." *United States v. Winter*, 35 M.J. 93, 95 (C.M.A. 1992). Similarly, as

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[2] Even if Appellant had stated that the Military Judge's denial of his challenge had led him to elect trial by members, we are not convinced that this single change in the facts of this case would necessitate altering our decision on the issue of the Military Judge's disqualification.

"fundamental legal principles require judges to decide cases based on evidence presented at trial," *id.*, the Military Judge's assurances that he would do precisely this must be accorded great weight. We find no merit in Appellant's "chilling effect" argument because there is no evidence the Military Judge's participation in earlier trials had any untoward effect upon witnesses in Appellant's trial. This argument also fails because it is presumed that counsel had access to earlier testimony and would themselves have been aware of and quick to point out any witness inconsistencies from one trial to the next.

IV.

MULTIPLICITY OF CHARGES

The single specification under Additional Charge III alleges that Appellant committed an indecent assault under Article 134, UCMJ, against Yeoman Third Class L [SN L apparently had been advanced to Yeoman Third Class (YN3) by the time charges were preferred]. The single specification under Additional Charge V alleges the same facts as Additional Charge III but charges that Appellant committed an indecent act under Article 134, UCMJ, with YN3 L.

At trial, Detailed Defense Counsel moved to dismiss Additional Charge V as multiplicious with Additional Charge III, contending that the alleged indecent act was a lesser included offense of the alleged indecent assault. The government responded that Additional Charge V alleged a consensual indecent act while Additional Charge III alleged a nonconsensual indecent assault; that the case law was unclear whether a consensual indecent act could be found to be a lesser included offense of indecent assault; and that, based upon exigencies of proof, the members might find that SN L

had consented to the acts allegedly committed by Appellant, rather than that she had been the victim of them.

The Military Judge denied Appellant's motion. He ruled that, although Additional Charge V was a lesser included offense of Additional Charge III, there was not an unreasonable multiplication of charges and that submitting both charges to the members as drafted would be clearer and less likely to lead to confusion on their part. He later instructed the members twice about the distinctions between the two charges, both when he first informed them about the charges and again prior to deliberations. In giving the first set of instructions to the members, the Military Judge stated that Additional Charge V was a lesser included offense of Additional Charge III. He repeated this statement in the latter instructions and he also explained to the members that they were to vote on Additional Charge III first and to consider Additional Charge V only if they acquitted Appellant of Additional Charge III. In the event they convicted him of Additional Charge III, the members were neither to vote nor make any finding with respect to Additional Charge V. We test the denial of Appellant's motion to dismiss for abuse of discretion. *United States v. Howard*, 24 M.J. 897 (C.G.C.M.R. 1987).

The Discussion following R.C.M. 307(c)(4) provides that

> what is substantially one transaction should not be made the basis for an unreasonable multiplication of charges. . . . There are times, however, when sufficient doubt as to the facts or the law exists to warrant making one transaction the basis for charging two or more offenses. In no case should both an offense and a lesser included offense thereof be separately charged.

For the purpose of deciding this issue, we shall assume that the Military Judge was correct in treating the alleged indecent

acts charge as a lesser included offense of the indecent assault charge. *See* ¶ 63d.(2), Part IV, MCM.

The Military Judge made it as clear as possible to the members that the two charges grew out of one set of alleged circumstances, that the only significant distinction between them was that of consent on the part of SN L, and that they could not convict Appellant of both charges, although they could acquit him of both. The fact that the members acquitted Appellant of Additional Charge III but convicted him of Additional Charge V lends credence to our belief that the members did understand and follow the Military Judge's instructions. We also are satisfied that allowing the members to consider both charges in the order in which he instructed did help to avoid confusion. In these circumstances, we find no abuse of discretion.

V.

THE DISHONORED CHECK OFFENSES

Appellant originally was charged under Article 123a, UCMJ, with one specification each of making three checks with intent to defraud. A copy of the Charge Sheet was served properly on Appellant prior to trial. Before arraignment, each specification was amended to charge a violation of Article 134, UCMJ, for making and uttering the checks and thereafter dishonorably failing to maintain sufficient funds for payment upon presentation. Each specification was amended by the Trial Counsel who made "pen and ink" changes. In so doing, however, he failed to include the word, "dishonorably," in the amended specifications. Appellant now maintains that each specification fails to state an offense and that his conviction under the charge and each specification should be set aside.

"A specification is sufficient if it alleges every element of the charged offense expressly or by necessary implication." R.C.M. 307(c)(3). *See also United States v. Sell*, 3 U.S.C.M.A. 202, 11 C.M.R. 202 (1953). Appellant does not contend that the original Article 123a, UCMJ, specifications were drafted incorrectly, and our own review confirms that each satisfies the requirements of R.C.M. 307(c)(3).

¶ 49d.(1), Part IV, MCM, provides that the making and uttering of a check and dishonorably failing thereafter to maintain sufficient funds is a lesser included offense under Article 123a, UCMJ. It is clear from the record that Appellant had been apprised properly of the greater offenses, *i.e.*, those alleged under Article 123a. It also is apparent that he had been involved in informal negotiations which led to the government's decision to charge him with only the lesser included offenses under Article 134, UCMJ. In such circumstances, we have no trouble concluding that Appellant has suffered no harm and is not entitled to relief for the government's failure to include the word, "dishonorably," in the three Article 134, UCMJ, specifications. *Cf. United States v. Watkins*, 21 M.J. 208 (C.M.A. 1986) (An unauthorized absence specification missing the words, "without authority," is defective, although not fatally so).

Appellant next contends that the Military Judge erred in admitting Prosecution Exhibit 10, a copy of three bank statements for his account dated 17 December 1991, 17 January 1992, and 18 February 1992, respectively. He argues that, inasmuch as the three dishonored checks were issued on 3, 9, and 12 January 1992, and presented for payment between those dates and 14 January 1992, the December and February statements should have been excluded under Rule 402, Military Rules of Evidence [hereinafter Mil.R.Evid].

Appellant also argues the February statement should have been excluded under Mil.R.Evid. 403 and 404(b) because it indicates the existence of other dishonored checks.

In attempting to prove Appellant's guilt of the three dishonored check offenses, the government was required to demonstrate that his failure to place or maintain sufficient funds in his checking account "was dishonorable." ¶ 68b.(4), Part IV, MCM. "Mere negligence in maintaining one's bank balance is insufficient for this offense, for the accused's conduct must reflect bad faith or gross indifference in this regard." ¶ 68c., Part IV, MCM.

The Military Judge admitted Prosecution Exhibit 10 over defense objection.[3] In so doing, he stated that "I find that the February statement is probative of the Accused's attitude toward his . . . checking account during the period in question and is probative of whether or not that attitude was grossly indifferent or grossly negligent or whether or not his conduct with respect to that bank account was dishonorable." Record at 106, Vol. III. Later, he gave a limiting instruction on the

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[3] The record is unclear as to the precise nature of Appellant's objections to admission of this exhibit at trial. The defense first made known its objection to the exhibit during a session conducted pursuant to Article 39(a), UCMJ. The next morning, an "off the record" conference was conducted by the Military Judge pursuant to R.C.M. 802. Back on the record, the Military Judge later alluded to this conference and Appellant's stated intention to object to admission of Prosecution Exhibit 10, but did not state the basis for the objection. It does appear that Appellant's sole objection was to the February bank statement and that it was based upon Mil.R.Evid. 404(b). Were this the case, we would deem waived Appellant's current assertions under Mil.R.Evid. 402 and 403 and his objection to the December statement. As it is not certain, we shall treat this issue as though Appellant did object to both the December and February statements and did cite all three Rules of Evidence at the time he initially objected.

use of Prosecution Exhibit 10, specifically admonishing the members to use the February statement

> for the limited purpose of its tendency, if any, to show the accused's state of mind or attitude with respect to the handling of his checking account transactions.
>
> . . . .
>
> You may not, and I repeat, you may not, use this evidence to conclude that the accused somehow is a bad person, and that, therefore, he must be guilty of these offenses that are charged with respect to the bad checks, or that he is a bad person and therefore he must be somehow guilty of the other offenses with which he is charged.

Record at 135–136, Vol. IV.

We have reviewed the December, January, and February statements ourselves. The December statement reveals one instance when Appellant overdrew his account by issuing a check when he had insufficient funds. The February statement reveals that Appellant not only overdrew his account, but that he had four "returned check charges" between 24 and 30 January 1992. The January statement, which Appellant does not contest, reveals that Appellant had four other "returned check charges," apparently including the three for which he was convicted.

We do not find that the Military Judge abused his discretion in admitting all three statements. The December statement was at least minimally relevant under Mil.R.Evid. 402 to demonstrate that Appellant had issued at least one check which would have overdrawn his account but for the "overdraft protection" which his bank then was willing to extend to him. The February statement was relevant in showing a continuing pattern, which first began in late

December of 1991, of Appellant's issuing checks without having sufficient funds to cover them. Under Mil.R.Evid. 404(b), the February statement was admissible to demonstrate the "absence of mistake or accident" on the part of Appellant, as well as his apparent lack of concern about maintaining a sufficient balance in his checking account. *Cf. United States v. Ferguson*, 29 M.J. 559 (A.F.C.M.R. 1989) (In circumstances similar to these, "'attitude' becomes one of the 'other purposes' for which uncharged misconduct is admissible under Mil.R.Evid. 404(b)." *Id.* at 561). Finally, under Mil.R.Evid. 403, we do not believe that the probative value of Prosecution Exhibit 10 was "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

Appellant's final assertion with respect to the three dishonored check charges is that the government failed to present adequate evidence to prove, beyond a reasonable doubt, two of the five elements of dishonorable failure to maintain sufficient funds, *viz.*, that his failure to maintain sufficient funds was dishonorable, ¶ 68b.(4), Part IV, MCM, and that his conduct was prejudicial to good order and discipline, ¶ 68b.(5), Part IV, MCM. We disagree.

The test for legal sufficiency is whether, considering the evidence in a light most favorable to the government, the trier of fact rationally could find the existence of every element of the alleged offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). The test for factual sufficiency is whether, after weighing the evidence in the record of trial and making allowances for our not having observed the witnesses personally, we are convinced of Appellant's guilt beyond a

reasonable doubt. Article 66(c), UCMJ, 10 U.S.C. @ 866(c); *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987).

The Navy–Marine Corps Court of Military Review recently had occasion to address the sufficiency of the evidence issue in two cases involving the failure to maintain sufficient funds. We find our sister Court's disscussions of the issues particularly instructive and helpful. *See United States v. Wright*, (N.M.C.M.R. Dkt. No. 91 0329 7 April 1993); *United States v. Hurko*, 36 M.J. 1176 (N.M.C.M.R. 1993).

> A charge of dishonorably failing to maintain funds requires some act of deceit, wilful evasion, bad faith, false promises, or other distinctly culpable circumstances showing a deliberate nonpayment or grossly indifferent attitude toward one's just obligations. The gist of the offense of dishonorably failing to maintain funds lies in the conduct of the accused after uttering the instrument, conduct which must reflect bad faith or gross indifference. (citations omitted).

United States v. Wright, supra, slip op. at 5.

In *Wright*, the Court set aside a guilty plea to an insufficient funds charge because the providence inquiry established that the accused, who knew at the time he issued the checks that he did not have sufficient funds, had intended to deposit money to cover them by the time of presentment to his bank. The Court went on to note that

> *Simple negligence, inadvertence or indifference in maintaining sufficient funds is not an offense in military law.* [The accused's] inability to cover the checks may have been caused by a negligent reliance on [an unnamed] source, not a dishonorable refusal to cover the checks, or even unforeseen events that could not

> reasonably have been foreseen. (citations omitted) (emphasis added).

Id. slip op. at 6.

In *United States v. Hurko*, the Navy–Marine Corps Court faced a similar situation involving the issuance of numerous checks over a short period of time, all of which were dishonored. In this case, however, the evidence established that the accused did have a named source who was supposed to have deposited funds into his account, *i.e.*, his wife. The Court set aside the findings of guilty of the first 20 dishonorable failure to maintain sufficient funds specifications, but affirmed 34 other similar specifications. The Court held that the accused's belief that his wife would deposit sufficient funds to cover the first 20 checks was "reasonable, and no evidence was introduced that challenged the reasonableness of his belief. . . . His blind reliance on [his wife was] . . . certainly careless and irresponsible but cannot be described as dishonorable." 36 M.J. at 1178.

In affirming the remaining specifications, the Court found it

> inconceivable that the [accused] could have believed that those subsequent checks would be covered. . . . Considering the sheer volume of checks written (36 for $ 3362.00) in a short period of time (26 days) and the absence of any possibility of a new source of funds to cover these checks, we find the evidence sufficient to prove that the [accused] wrote all [the remaining] checks . . . knowing they would not be honored and with intent to defraud.

Id. at 1179.

In the present case, the evidence reveals that Appellant had made an Automatic Teller Machine (ATM) inquiry on 26

December 1991, which advised him that he had $3.44 in his account. Between that date and 2 January 1992, $595.17 was deposited into his account, leaving a total of $598.61 available to be drawn against. Appellant issued ten checks totalling $559.53 and withdrew $188.00 from an ATM without having made any additional deposits. Three of these checks, each of which was dishonored, were the ones for which he was charged. The total of all the checks and withdrawals was $ 747.53. Accordingly, Appellant attempted to "overdraw" his account by $ 148.92. There was no evidence that Appellant's bank was willing to permit such a substantial overdrawing of his account. Appellant's only explanation at trial was that he believed he "did have money in there to cover it."

Unlike the situation in either *United States v. Wright* or *United States v. Hurko, supra*, Appellant could not have held a reasonable belief that all of the checks would be honored. At best, the most he might have hoped for was that some of them might not be presented for payment before he could make his next deposit. Such an attitude goes well beyond "simple negligence, inadvertence or indifference in maintaining sufficient funds," *United States v. Wright*, (N.M.C.M.R. Dkt. No. 91 0329 7 April 1993) unpublished slip op. at 6, and does reflect "bad faith or gross indifference in this regard." ¶ 68c., Part IV, MCM.

Appellant argues that, in any event, his conduct was not to the prejudice of good order and discipline or of a nature to bring discredit upon the armed forces. This argument is premised upon the testimony of the Exchange Officer at the Coast Guard Exchange where the three checks had been cashed, who did state that these were three of many which had been dishonored, Appellant ultimately made good on them, and returned checks were a normal part of doing

business. However, the Exchange Officer also testified that such dishonored checks create cash flow problems for the exchange, and, if never paid, decrease the profits of the Exchange and, ultimately, the amount which the Exchange can contribute to the Morale Fund. We are satisfied that this testimony adequately establishes both conduct to the prejudice of good order and discipline, ¶ 60c.(2)(a), Part IV, MCM, and conduct of a nature to bring discredit upon the armed forces, ¶ 60c.(3), Part IV, MCM. We reject Appellant's "cost of doing business" argument. It would, were we to agree with it, effectively allow an "open season" on the funds of the Coast Guard Exchange System.

Accordingly, we find the evidence legally and factually sufficient to support Appellant's convictions for dishonorably failing to maintain sufficient funds.

VI.

ACTION

The remaining asserted issues are resolved adversely to Appellant. We independently have reviewed the appropriateness of the sentence, *United States v. Snelling*, 14 M.J. 267 (C.M.A. 1982), and find it appropriate. Accordingly, the findings and the sentence, as approved below, are affirmed.

Chief Judge Baum and Judge Bastek concur.

APPENDIX D

UNITED STATES COURT OF
APPEALS FOR THE ARMED FORCES

USCA Dkt. No. 95-0941/CG
Crim. App. No. 1025

United States, Appellee

v.

Jake A. Lazenby (539-94-4217), Appellant

ORDER

On further consideration of the granted issue (43 MJ 422) in light of *United States v. Ryder*, 44 MJ 9 (1996), it is, by the Court, this 21st day of May, 1996,

ORDERED;

That the decision of the United States Coast Guard Court of Criminal Appeals is affirmed.

For the Court,

/s/
John A. Cutts, III
Deputy Clerk of the Court

APPENDIX E

UNITED STATES COAST GUARD
COURT OF CRIMINAL APPEALS

Washington, DC

UNITED STATES

v.

Jake A. Lazenby
Machinery Technician Third Class, U.S. Coast Guard

CGCMS 24080

Docket No. 1025

2 JUNE 1995

[42 M.J. 702]

Special Court-Martial convened by Commander, USCG Maintenance and Logistics Command Pacific. Tried at Coast Guard Maintenance and Logistics Command Pacific, Alameda, California.

Military Judge: CAPT Ronald C. Zabel, USCG

Trial Counsel: LT Robert S. Schuda, USCG

Defense Counsel: LCDR Hugh F. Sage, USCG

Appellate Defense Counsel: LCDR Allen Lotz, USCG

Appellate Government Counsel: LCDR Charles J. Bennardini, USCG

BEFORE
PANEL SIX
BAUM, BRIDGMAN, AND O'HARA
Appellate Military Judges

Baum, Chief Judge:

Appellant was tried by special court-martial judge alone. Pursuant to his pleas of guilty, entered in accordance with a pretrial agreement, he was convicted of the following offenses: one specification of larceny of various articles of military property over a period of time, of an aggregate value of at least $805, in violation of Article 121, UCMJ; and two specifications in violation of Article 134, UCMJ, one for wrongful receipt of a pair of night vision goggles, military property of the United States, of a value of about $5,000, and the other for wrongful receipt of a monocular night vision device, of some value, knowing it had been stolen. The judge sentenced Appellant to a bad conduct discharge, confinement for four months, forfeiture of $400 pay per month for four months, and reduction to pay grade E-2. The convening authority approved the adjudged sentence as authorized by the pretrial agreement.

Appellant's plea bargain permitted conditional pleas preserving the right to appeal the judge's rulings on motions to suppress evidence obtained from a search of quarters and derivative evidence. Having entered such pleas with appeal rights preserved, Appellant now assigns as error the judge's ruling denying, in part, the motion to suppress. As his second assigned error, Appellant asserts that this Court lacks jurisdiction because of service of civilian judges who purportedly have not been appointed in accord with the Appointments Clause of the Constitution. This assignment has been rejected numerous times based on *United States v.*

Carpenter, 37 M.J. 291 (C.M.A. 1993), petition for cert. filed, No. 93-676 (U.S. 29 October 1993). It is rejected again for the same reason. The first assignment remains to be addressed:

THAT THE MILITARY JUDGE ERRED BY DENYING, IN PART, THE DEFENSE MOTION TO SUPPRESS EVIDENCE OBTAINED FROM AN ILLEGAL SEARCH OF APPELLANT'S QUARTERS AND DERIVATIVE EVIDENCE OBTAINED AS A RESULT OF THAT SEARCH

Appellant contends that the search of his assigned quarters at Coast Guard Station Humbolt Bay, Samoa, California, was unlawful and that the evidence seized in that search, as well as any derivative evidence, should have been suppressed by the military judge. In support of this contention, Appellant argues that the official who authorized the search was not neutral and detached, as required, and that the search authorization was not based on probable cause. The authorizing official was a Coast Guard chief warrant officer, who, as the Commanding Officer of USCG Station Humbolt Bay, was responsible for the security and safety of quarters located there. He had no command authority over Appellant, who was attached to a Coast Guard cutter, but did exercise control over the quarters assigned to Appellant. This officer issued the search authorization on the basis of a written request and affidavit from a Coast Guard special agent investigating the suspected theft of night vision goggles from Appellant's cutter. That agent, who was well known by the commanding officer, presented the request and affidavit in person. After signing the authorization to search, the commanding officer accompanied the agent to the quarters and remained there throughout the search and seizure.

A. Impartiality Requirement For Officer Authorizing Search

Pursuant to Military Rule of Evidence (M.R.E.) 315(d)(l), and Article 9-A-3 of the Coast Guard's Military Justice Manual (MJM), commanding officers are empowered to authorize searches as long as they are impartial. Appellant challenges the impartiality of the Commanding Officer, Coast Guard Station Humbolt Bay, by asserting that he did not act in a neutral and detached capacity. In support of this contention, Appellant says that the commanding officer readily accepted the special agent's request for a search without questioning him or seeking guidance when this was the authorizing officer's first such search request. Appellant sees these actions as indication of a lack of neutrality.

Appellant also says that the action of the commanding officer in accompanying the agent to the scene "and his participation in the search itself destroy any illusion of impartiality." Appellant's Brief at p. 8. The Government does not address this specific assertion, but points out that the commanding officer was not involved in the theft investigation and had no personal motive to act other than impartially. Quoting from *United States v. Sloan*, 30 M.J. 741, 746 (A.F.C.M.R. 1990), the Government says, "He did not instigate the investigation or devise the plan that ensnared the Appellant." Government's Brief at p. 3.

The judge's findings accord with the views expressed by the Government. The judge found that there was no evidence of anything in the background of the commanding officer that would taint his neutrality, that he "had no prior or subsequent involvement with the investigation except for what transpired on the day of the search in question." R. 267. We agree. The evidence shows that the commanding officer did not know the accused, had no interest in the investigation, personal or otherwise, and was acting solely as the officer responsible for the quarters on his station.

The judge also found that the authorizing officer's actions by going to the room and witnessing the search did not in any way taint his neutrality. In this regard, M.R.E. 315(d) says that an otherwise impartial authorizing official does not lose that character merely because he or she is present at the scene of the search. The evidence indicates that, while the commanding officer remained at the scene for the entire procedure, it was essentially to observe that proper actions were being taken in quarters for which he was responsible. We, therefore, reject Appellant's characterization of that officer's involvement as one of participation in the search. His presence during the search did not reflect a lack of impartiality.

We also find it understandable that the commanding officer relied on the agent's affidavit and explanation in issuing the authorization to search, without questioning him at length. The commanding officer knew the agent personally and had confidence in his explanation, which set out all the necessary details. The commanding officer said that he asked enough questions to verify in his mind that the agent had the necessary information and that he "believed there was probable cause to go look in that area." R. 199. Nothing in his actions would cause us to conclude that he was anything but a neutral and detached official who acted impartially in the matter. There was a substantial basis for the judge's neutrality finding, and, considering the issue *de novo*, we reach the same conclusion.

As a separate matter, MJM, Article 9-A-3, recommends that commanding officers authorize searches based on probable cause only in the most exigent circumstances when resort to a military judge would likely result in harm or loss of evidence. This case was certainly not one of exigency. The ship was at sea en route to Alaska, with the accused aboard,

so there was no danger of his returning any time soon and disposing of the evidence. Moreover, there was no indication that a military judge was not available to act on a search request. No attempt was made by the agent to contact a judge and no guidance from a staff judge advocate was sought by the commanding officer nor, for that matter, were any steps taken to check the pertinent portions of the MJM.

Operating in this manner invites error. It increases the chances of an improper search and the violation of important individual rights. Departures of this kind from recommended procedures may also jeopardize the Government's case, with the possibility that time and resources invested in developing a prosecution will come to nought. Despite our criticism of the failure to follow the pertinent MJM provision, however, the seized evidence is still admissible. As MJM, Article 9–A–1a, makes clear: "Although the procedures set out herein should be followed as appropriate under [the] circumstances, deviations will not invalidate a search which would otherwise be valid." That leaves us with the remaining question, whether the requirement for probable cause was satisfied.

B. Probable Cause

M.R.E. 315(f)(2) says that: "Probable cause to search exists when there is a reasonable belief that the ... property ... sought is located in the place ... to be searched." *United States v. Lopez*, 35 M.J. 35, 38 (C.M.A. 1992), tells us that a determination in this regard should be based on the totality–of–the–circumstances test of *Illinois v. Gates*, 462 U.S. 213, 233 (1983), rather than the replaced informant–reliability and basis–of–knowledge test of *Aquilar v. Texas*, 378 U.S. 108 (1964), and *Spinelli v. United States*, 393 U.S. 410 (1969). Appellant, while acknowledging the foregoing, also cites *United States v. Lopez, supra*, for the proposition that the

Aquilar–Spinelli test remains highly relevant in determining probable cause. He contends that there was no probable cause to support the search authorization in this case because the search request depended entirely on the statement of one person and that person's reliability was not considered by either the requesting agent or the authorizing officer.

The facts bearing on this issue are found in the investigating agent's affidavit supporting the search request and in his testimony and that of the commanding officer. The affidavit recounted the agent's investigation of a reported theft of night vision goggles from the USCGC Acushnet and noted interviews of personnel attached to the ship. One of those interviewed was a Seaman Hill, who, others opined, had stolen the goggles. That individual acknowledged temporarily taking a night vision device that he returned after a few days. He, and two others interviewed, stated that the device he took was different from the one sought by the agent.

The affidavit went on to say that on a day the agent was at home he received a telephone call from the ship's executive officer on the "MARSAT" telephone system while the ship was at sea destined for Kodiak, Alaska. In the phone call, the executive officer stated that one of those interviewed by the agent had volunteered that he had engaged the Appellant in a conversation about the investigation and that the Appellant said "he was considering coming forward about the night scope because he stole it and felt bad that SN Hill was being accused of this particular theft."

The Appellant was then reported to have said "that he did not know how to turn the night scope in because it was hidden in a locked duffle bag [sea bag] which was stored in his closet of his room at CG Station Humbolt." App. Exh. XII. The executive officer gave the agent the number of the

apartment assigned to Appellant and two others from the ship, along with information that there are no specific room assignments, but that most rooms inside the apartment are marked. This affidavit, as part of the request for authority to search, was presented to the commanding officer on the same day the call was received from the executive officer of the Acushnet. Noted in the affidavit also was the fact that the executive officer had been the agent's assistant branch chief in a former assignment and the agent clearly recognized the voice from numerous prior conversations.

Given these facts, the military judge concluded that the search authorization was based on probable cause. In reaching this conclusion he found, among other things, that the affidavit contained sufficient particular facts upon which to base a probable cause determination and that the commanding officer, in making that determination, reasonably relied on his prior dealings with the executive officer of the Acushnet and with the investigating agent. Two other factors properly bearing on this matter are the timeliness of the information provided and the relationship between the crime objects and the place to be searched. *United States v. Lopez*, 35 M.J. 35, 38 (CMA 1992). Both of these aspects were present here, with the request for search authorization conveyed to the commanding officer the same day the telephone call from the Acushnet executive officer was received and the place to be searched pinpointed precisely.

Nevertheless, Appellant argues that probable cause requirements were not met because the only evidence presented to support the search, in his view, was the statement of one individual recounting what purportedly was said by the Appellant, and the reliability of that individual was not considered by the agent and the commanding officer. Indeed, that statement did furnish the location of the item sought, but

there also was other evidence bearing on the decision to search. Investigative background was supplied which placed the reported statement in context and provided plausibility. Moreover, prior associations were such that queries and explanations concerning reliability could have been seen as superfluous.

From past dealings, the commanding officer had reason to consider the agent reliable, and both he and the agent knew the executive officer well enough to rely on his good judgment in assessing the credibility of the reported information. In this regard, we also note "the unique 'truth-telling effect' of an identified servicemember's giving information in the presence of a superior officer," as recognized in *United States v. Tipton*, 16 M.J. 283, 287 (CMA 1983). For all of these reasons we believe there was a substantial basis for the judge's probable cause determination. We have also assessed the evidence *de novo* and independently find to our satisfaction that there was probable cause to search Appellant's quarters and his locked sea bag. The assignment of error is rejected.

We have reviewed this record pursuant to Article 66, UCMJ, and have determined that the findings and sentence are correct in law and fact and should be approved. Accordingly, the findings and sentence, as approved below, are affirmed.

Judges Bridgman and O'Hara concur.

APPENDIX F

UNITED STATES COURT OF
APPEALS FOR THE ARMED FORCES

USCA Dkt. No. 95-0909/CG
Crim. App. No. 946

United States, Appellee

v.

Michael B. Leaver (022-46-8539), Appellant

ORDER

On further consideration of the granted issue (43 MJ 422) in light of *United States v. Ryder*, 44 MJ 9 (1996), it is, by the Court, this 21st day of May, 1996,

ORDERED;

That the decision of the United States Coast Guard Court of Criminal Appeals is affirmed.

For the Court,

/s/
John A. Cutts, III
Deputy Clerk of the Court

APPENDIX G

UNITED STATES COAST GUARD
COURT OF CRIMINAL APPEALS

Washington, DC

UNITED STATES

v.

Michael B. Leaver
Chief Warrant Officer, U.S. Coast Guard

CGCM 0032

Docket No. 946

21 April 1995

[42 M.J. 599]

BEFORE
PANEL TWO
BAUM, FEARNOW, AND O'HARA
Appellate Military Judges

General Court-Marital convened by Commander, First Coast Guard District, Boston, Massachusetts. Tried at the Office of the Commander, First Coast Guard District, Boston, Massachusetts from 5-7 September 1989.

Military Judge: CAPT Douglas A. Smith, USCG
Trial Counsel: CDR Michael A. Leone, USCG
Assistant Trial Counsel: LT Robert E. Korroch, USCG

Detailed Defense Counsel: LT Mark R. B. Stewart, USCGR

Appellate Defense Counsel: Dan R. Hyatt, Esquire

Appellate Defense Counsel: LCDR Allen Lotz, USCG

Appellate Government Counsel: LCDR Charles J. Bennardini, USCG

Per Curiam:

This is our third review of this case. Its history may be found in prior opinions of this Court and the U.S. Court of Military Appeals. *United States v. Leaver*, 40 M.J. 529 (CGCMR 1993); *United States v. Leaver*, 36 M.J. 133 (CMA 1992); *United States v. Leaver*, 32 M.J. 995 (CGCMR 1991). Those opinions reveal that we initially affirmed findings and sentence in 1991 after rejecting assignments of error that included allegations of inadequate trial representation. Thereafter, the Court of Military Appeals, finding prejudicial lack of post-trial representation in the period before the convening authority acted, returned the record for a new convening authority's action. Upon completion of that step, the record was forwarded to this Court and we returned it again to the convening authority to ensure proper consideration of all matters submitted in the accused's behalf. That has been accomplished.

After review of all defense submissions, and with appropriate advice from his staff judge advocate, the convening authority on August 18, 1994 approved a dismissal, five years confinement and total forfeitures, but suspended all forfeitures in excess of $2,293.40 per month effective 1 July 1991, pursuant to clemency action taken by the Secretary of Transportation on 26 August 1991. Twenty-nine days of *Allen* credit toward the sentence of confinement was also provided. Thereafter, the record was once again

referred to this Court for review on 13 September 1994. Four and a half months later, after obtaining two enlargements of time, civilian defense counsel submitted two summary assignments of error.

The first assigned error reasserts an assignment of ineffective trial representation, incorporating by reference the facts, argument, and conclusions presented in a brief of 31 August 1993. The second assignment submits an oft repeated summary contention that this Court lacks jurisdiction because of service of civilian judges who purportedly have not been appointed in accord with the Appointments Clause of the Constitution. This second assignment has been asserted in numerous cases and rejected in each instance based on *United States v. Carpenter*, 37 M.J. 291 (C.M.A. 1993), petition for cert. filed, No. 93-676 (U.S. 29 October 1993). It is rejected again for the same reason.

Appellant's other assignment concerning trial representation was raised and rejected the first time the case was before us. Our evaluation then of the trial record and defense counsel's affidavit explaining his actions convinced us that there was no merit to the claim of ineffective representation. The trial defense counsel's rationale for actions taken made sense to us then and they still make sense today, after consideration of all the matters presented in support of Appellant's contentions. We again find no merit to Appellant's assertion of ineffective trial representation. We have also reviewed this record again pursuant to Article 66, UCMJ, and have determined that the findings and sentence are correct in law and fact and should be approved. Accordingly, the findings and sentence, as approved and partially suspended below, are affirmed.

Chief Judge Baum and Judges Fearnow and O'Hara concur.

APPENDIX H

UNITED STATES COURT OF
APPEALS FOR THE ARMED FORCES

USCA Dkt. No. 95-0702/CG
Crim. App. No. 1039

United States, Appellee

v.

James A. Leonard (113-60-9998), Appellant

ORDER

On further consideration of the granted issue (43 MJ 169) in light of *United States v. Ryder*, 44 MJ 9 (1996), it is, by the Court, this 21st day of May, 1996,

ORDERED;

That the decision of the United States Coast Guard Court of Criminal Appeals is affirmed.

For the Court,

/s/
John A. Cutts, III
Deputy Clerk of the Court

APPENDIX I

UNITED STATES COAST GUARD
COURT OF CRIMINAL APPEALS

Washington, DC

UNITED STATES

v.

James A. Leonard
Subsistence Specialist Second Class, U.S. Coast Guard

CGCMG 0087

Docket No. 1039

9 MARCH 1995

[41 M.J. 900]

General Court-Martial convened by Commander, Coast Guard Pacific Area. Tried at Coast Guard Maintenance and Logistics Command Pacific, Coast Guard Island, Alameda, California, 13 June 1994.

Military Judge: CAPT Lane I. McClelland, USCG
Trial Counsel: LT S. P. McCleary, USCGR
Defense Counsel: LT T. K. Taira, USCGR
Appellate Defense Counsel: LCDR Allen Lotz, USCG
Appellate Government Counsel: LCDR John Koeppen, USCG

BEFORE
PANEL THREE
BAUM, BRIDGMAN, AND FEARNOW
Appellate Military Judges

Baum, Chief Judge:

Appellant was tried by general court-martial, judge alone. Pursuant to his pleas of guilty, entered in accordance with a pretrial agreement, he was convicted of one specification of committing an indecent act on a ten year old girl by rubbing the skin in her genital area with his hand, with intent to gratify his own sexual desires, in violation of Article 134, Uniform Code of Military Justice (UCMJ). The military judge sentenced Appellant to a bad conduct discharge, confinement for two years, and reduction to pay grade E-3. The convening authority approved the sentence as adjudged, but suspended the confinement in excess of eighteen months for a period of four years from the date of trial, as provided for in the pretrial agreement. Appellant has assigned three errors before this Court: (1) that the period of four years suspension is unreasonably long, (2) that an unsuspended bad conduct discharge is inappropriately severe punishment, and (3) that this Court lacks jurisdiction because of civilian judges on the Court who have not been appointed in accordance with the Constitution. The last assignment has been rejected numerous times based on *United States v. Carpenter*, 37 M.J. 291 (CMA 1993), petition for cert. filed, No. 93-676 (U.S. 29 October 1993), and is rejected again for the same reason. The other assignments will be addressed.

I

SUSPENSION OF CONFINEMENT FOR A PROBATIONARY PERIOD OF FOUR YEARS

a. Unreasonably Long Suspension Prohibited

Appellant points out that Article 60(c)(2) of the Uniform Code of Military Justice (UCMJ) authorizes the convening authority to suspend a sentence in whole or in part, with no restrictions stated, but that the President, in promulgating the Manual for Courts-Martial (MCM), has set a limitation on the period of suspension in Rule for Courts-Martial (RCM) 1108(d) by stating that it "shall not be unreasonably long." Additionally, RCM 1108(d) authorizes the Secretary concerned to further limit by regulations the period for which the execution of a sentence may be suspended. For the Coast Guard as noted by Appellant, the Secretary of Transportation's regulation in this regard is embodied in Section 5-E of the Coast Guard's Military Justice Manual, COMDTINST M5810.1C (MJM). Specifically, section 5-E1.b. states:

> The officer exercising general court-martial jurisdiction over the accused, may in addition to authority otherwise granted, suspend or remit any part or amount of the unexecuted part of a sentence, other than a sentence approved by the president. No suspension may be for an unreasonable (sic) long period. Absent unusual circumstances, the period of suspension shall normally not exceed 18 months.

Appellant contends that the four year period of suspension in this case is unreasonably long, considering that it is two and two thirds times the normal maximum suspension period of 18 months, that it covers the full period

of confinement plus an additional two and a half years beyond that confinement, and that it includes probationary conditions that Appellant terms as onerous. Furthermore Appellant says that the suspension should be deemed unreasonably long especially since no unusual circumstances were set out in the record to support extension beyond the normal maximum period of 18 months.

The Government responds that the MJM does not require the general court-martial convening authority to articulate or consider unusual circumstances in order to suspend a sentence for longer than 18 months; that, instead, the Secretarial regulation merely points out to convening authorities that unusual circumstances provide a basis for extended suspension. In any event, according to the Government, a Secretarial regulation cannot purport to undermine the direct delegation by Congress to the convening authority of the sole discretion to modify a sentence. As the Government sees it, binding the convening authority to an 18 month limit on suspensions, absent a showing and consideration of unusual circumstances, is contrary to Article 60(c), UCMJ. With respect to this latter assertion by the Government, we disagree.

No cases are cited by the Government in support of its argument concerning a violation of Article 60(c) requirements and none has been found by us. There are decisions by the Army Court of Military Review, however, that implement with approval the Secretary of the Army's limitation of suspensions to certain fixed periods. *United States v. Koppen*, 39 M.J. 897 (ACMR 1994); *United States v. Kinney*, 22 M.J. 872, 875 (ACMR 1986); *United States v. Snodgrass*, 22 M.J. 866 (ACMR 1986); *United States v. Robertson*, 21 M.J. 1005 (ACMR 1986). The Government cites one of these cases, *United States v. Koppen, supra*, but distinguishes the type of

limitation by the Secretary of the Army from the Coast Guard's Secretarial action, which the Government characterizes and condemns as the creation of additional matters the convening authority must consider as a threshold to determining the length of a probationary suspension. We fail to recognize the distinction seen by the Government. In our view, the Coast Guard's MJM provision, like the Army's, simply sets additional limits on the terms of suspension, as authorized by RCM 1108(d). In this regard, we adopt with approval the rationale in *United States v. Kinney*, *supra*, n. 3 at 22 M.J, 875.

b. In Coast Guard, Suspensions Should Not Exceed Eighteen Months, Unless Unusual Circumstances Appear In the Record

As to the Government's initial assertion that the MJM does not require the convening authority to articulate unusual circumstances in suspending a sentence beyond 18 months, we agree. If those unusual circumstances are not articulated by the officer suspending the sentence, however, they should be readily discernible from the facts of the case, or, absent that, documented on the record by the Government. Certainly, the convening authority should consider such circumstances when contemplating the length of a suspended sentence. Section 5-E1.b, MJM, sets the normal maximum suspension period for a court-martial sentence in the Coast Guard at 18 months. In order to exceed that period, there should be unusual circumstances appearing somewhere in the record. Here, neither the convening authority nor anyone else explained why the suspension was for a period of four years rather than the normal 18 months. Without reasons having been advanced, we have looked for some basis in the facts of the case.

Rather than discovering unusual circumstances from the facts that would justify a longer than normal suspension, we

find just the opposite. Appellant's discharge was not suspended, only a portion of his confinement. With an approved and unsuspended discharge, appellant presumably will not be returned to duty upon completion of confinement, since the law authorizes his being sent home involuntarily on appellate leave awaiting completion of appellate review and the execution of his discharge[1]. While on appellate leave, there would be diminished interest and access to information concerning Appellant's activities and, thus, less likelihood that his conduct and behavior would be monitored by the Coast Guard. Moreover, upon execution of the discharge, after appellate review has been completed, the suspended confinement would be remitted pursuant to RCM 1108e, thereby terminating the period of probation. Under these circumstances, there appears to be little reason for the Coast Guard to continue a probationary suspension after Appellant has left the supervisory control of the military environment.

If the discharge in this case had been disapproved or suspended on probation, with the expectation that Appellant would return to duty after confinement, a reason might be readily apparent for an extended period of suspension. Upon return to duty, continuation of the suspension beyond the normal eighteen months called for by Secretarial regulation could be viewed as facilitating Appellant's successful reintegration into the Coast Guard community by providing strong motivation for him to continue to meet the treatment and counseling terms of probation. Appellant, while contending that four years would still be unreasonably long

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[1] Art. 76a., UCMJ authorizes the Service Secretaries to issue regulations requiring an accused with an approved and unsuspended discharge to take leave pending coapletion of Appellate review. Article 12-D-2 of the Coast Guard Personnel Manual, COMDTINST M1000.6A, sets forth procedures of such leave in the Coast Guard.

even under these circumstances, seems to concede that such factors would possibly justify a longer probationary period when he says: "[i]f the bad-conduct discharge were disapproved or suspended...the various concerns involved in determining an appropriate period of suspension may make a somewhat longer period of suspension appropriate...." n. 1, p. 4 Appellant's brief.

Here, however, the bad conduct discharge was approved without suspension and the four years probation for the suspended portion of confinement could continue for two and a half years after release from incarceration and presumed return to the civilian community, assuming the bad conduct discharge was not sooner executed. Given these facts, the unusual circumstances necessary as justification for extending the period of suspension beyond 18 months are simply not apparent from the particulars of this case. Accordingly, without justification having been set out in the record or appearing from the details of the case, the probationary period should be reduced to the 18 month normal suspension called for in MJM, section 5-E1.b, unless there is some other reason to allow the four year suspension to stand.

c. Absent Plain Error, Suspension Period Exceeding Eighteen Months Is Waived When Included In Plea Bargain and Not Objected to at Trial

The Government proffers another reason in support of the probationary term, arguing that Appellant affirmatively waived any objection to the length of the suspension by entering into a pretrial agreement which called for a four year period of probation. The Government says that Appellant took such action knowingly, intelligently, and voluntarily, with assistance of counsel, and that, absent plain error, he should not now be heard to object. We also note that no

objection to the period of suspension was raised by Appellant and his counsel when the judge covered that aspect of the plea bargain at trial as part of the interpretation and explanation of the agreement she was required by RCM 910(f) to give the accused. The Government is, therefore, correct that, unless the requirement in the agreement for a four year suspension of confinement constitutes plain error, the issue will be deemed waived pursuant to RCM 801(g) and 905(e).

The Government, citing *United States v. Olano*, 113 S. Ct. 1770 (1993), and *United States v. Toro*, 37 M.J. 313 (CMA 1993), says that plain error is an obvious error that affects substantial rights of an accused. Applying that test, the Government submits that the period of suspension is not so obviously unreasonable that it affects a substantial right of Appellant. In assessing that contention, we look first to RCM 705 to see what, if anything, the MCM says about plea agreement provisions of this nature. Certainly, if that rule prohibits their inclusion in plea bargains, then such a provision might necessarily constitute plain error, since RCM 705(c)(1)(B) generally prohibits agreement terms that deprive an accused of basic and substantial rights. Rather than prohibiting agreement provisions relating to probationary suspensions of sentences, RCM 707(c)(2)(D) expressly permits such provisions. The rule does not say anything about the length of suspensions, however. This leaves us where we started, with regulations that say the period of suspension should not be unreasonably long, which, in the Coast Guard, is normally not more than eighteen months, unless there are unusual circumstances. Given this state of affairs, we will determine whether there has been plain error based on our evaluation of the egregiousness of the period of suspension.

The period of suspension commenced when sentence was adjudged, as did the confinement. All confinement in

excess of 18 months was suspended so that a four year suspension continues for the period of unsuspended confinement plus an additional two and a half years. During that period Appellant presumably will be returned home where the terms of his probation will be unsupervised by the Coast Guard. While we do not see the particular need or interest to the Coast Guard of a probationary suspension at that point when the Appellant is no longer confined or returned to duty, we cannot say that the four year period alone is so egregious that it constitutes plain error.

Appellant contends that it is not just the length of the suspension alone that should prompt its reduction, but the additional factor of "onerous conditions on suspension that were imposed in the pretrial agreement (counseling/sex offender treatment, prohibition on contact with minors)." Appellant's brief p.3. In that regard, the plea bargain does call for compliance with requirements prescribed or ordered for the diagnosis or treatment of disorders or conditions contributing to the offense and prohibits Appellant's contact with children under eighteen, outside of his immediate family, unless supervised by other persons. Another provision forbids any contact whatsoever with the victim without permission of both her parents and requires any attempts to contact her or her family to be made through the Maintenance and Logistics Command's Legal Division. While details and possible questions concerning these provisions were not fully probed during the judge's colloquy with Appellant and Counsel, no objection to these provisions were raised at trial and they have not been challenged here except in terms of contributing to the asserted unreasonableness of the four year suspension. Although the utility of these provisions during the extended period of suspension is doubtful, we do not see them as onerous. They do not transform the suspension into

something that constitutes plain error. Accordingly, we deem the error in suspending the confinement for a period not in compliance with the military justice manual to have been waived by the Appellant.

II

THAT AN UNSUSPENDED BAD CONDUCT DISCHARGE IS AN INAPPROPRIATELY SEVERE PUNISHMENT IN THIS CASE

Appellant contends that an unsuspended punitive discharge is inappropriately severe for him and the offense of which he was convicted. In support of this contention, Appellant points to the evidence submitted in extenuation and mitigation, which he says paints a clear picture of an excellent performer who seems to have favorably impressed everyone with whom he worked, including, among others, the former Superintendent of the Coast Guard Academy, who wrote a letter in Appellant's behalf, and the current Commander of the Maintenance and Logistics Command Pacific, who testified about Appellant's excellent duty performance and personal qualities and indicated that the offense was "so far out of character for the man I think I know that I found it difficult to believe." R. at 72–78. Appellant also cites testimony from the wife of a Coast Guard petty officer who also indicated that she believed the act to be completely out of character and that she would permit Appellant to be with her children, despite his offense. In further support of this proposition, Appellant notes a submission by the counselor who worked with him between the time of the offense and the trial expressing an opinion that Appellant does not have the characteristics of pedophilia, and is not likely to molest any child in the future.

Appellant asserts that Coast Guard policy encourages the retention and rehabilitation of abusers if possible. Given this

policy, together with Appellant's superior performance for approximately nine years, the purported one-time nature of the offense, and Appellant's full acceptance of responsibility for the offense, he says an unsuspended bad conduct discharge is inappropriately severe. While Appellant argues that these factors should cause us to see the discharge as inappropriate, we view them as bearing more on clemency rather than sentence appropriateness. As we have noted before, there is a distinct difference between these two concepts. The latter is within our realm, but the former is an act of leniency outside the scope of our judicial review. *United States v. Santos*, 29 M.J. 1064 (CGCMR 1990); *United States v. Hardin*, 29 M.J. 801 (CGCMR 1989); *Garcia v. United States*, 28 M.J. 917 (CGCMR 1989); *United States v. Espinoza*, 27 M.J. 551 (CGCMR 1988). Despite the favorable matters presented in Appellant's behalf, we are unable to say that an unsuspended punitive discharge is inappropriately severe for this offense and this accused. Accordingly, Appellant's assignment of error is rejected.

III

CONCLUSION

The findings and sentence are determined to be correct in law and fact and on the basis of the entire record should be approved. Accordingly, the findings and sentence, as approved and partially suspended below, are affirmed.

Judges Bridgman and Fearnow concur.

APPENDIX J

UNITED STATES COURT OF
APPEALS FOR THE ARMED FORCES

USCA Dkt. No. 95-1130/CG
Crim. App. No. 1045

United States, Appellee

v.

Robert J. Nichols (455-11-9283), Appellant

ORDER

On further consideration of the granted issue 43 MJ 432 (1996), in light of *United States v. Ryder*, 44 MJ 9 (1996), it is, by the Court, this 21st day of May, 1996,

ORDERED;

That the decision of the United States Coast Guard Court of Criminal Appeals is affirmed.

For the Court,

/s/
John A. Cutts, III
Deputy Clerk of the Court

APPENDIX K

UNITED STATES COAST GUARD
COURT OF CRIMINAL APPEALS

Washington, DC

UNITED STATES

v.

Robert J. Nichols
Yeoman, Second Class, U.S. Coast Guard

CGCMG 0091

Docket No. 1045

14 July 1995

General Court-Martial convened by Commander, Eighth Coast Guard District, New Orleans, Louisiana. Tried at U.S. Coast Guard Group Galveston, Galveston, Texas on 8 November 1994.

Military Judge: CAPT Lane I. McClelland, USCG
Trial Counsel: LT Charles D. Michel, USCG
Assistant Trial Counsel: LCDR Thomas P. Marian, USCG
Detailed Defense Counsel: LT Edward J. Cook, USNR
Civilian Defense Counsel: Luis A. Vallejo, Esquire
Appellate Defense Counsel: LCDR Allen Lotz, USCG
Appellate Government Counsel: LCDR Charles J. Bennardini, USCG

BEFORE
PANEL TWO
BAUM, FEARNOW, AND O'HARA
Appellate Military Judges

Per Curiam:

Appellant was tried by general court-martial, military judge alone. Pursuant to his pleas of guilty, entered in accordance with a pretrial agreement, he was convicted of the following offenses: two specifications of attempted distribution of cocaine in violation of Article 80, UCMJ; one specification of conspiracy to distribute cocaine and marijuana in violation of Article 81, UCMJ; three specifications of distribution of cocaine and four specifications of distribution of marijuana in violation of Article 112a; one specification of secreting mail matter, two specifications of solicitation to distribute marijuana, and two specifications of use of a communication facility, a telephone, to facilitate a felony in violation of Article 134, UCMJ. The judge sentenced Appellant to a bad conduct discharge, eight years confinement, forfeiture of all pay and allowances, and reduction to pay grade E-1, which was approved by the convening authority as within the terms of the pretrial agreement.

Before this Court, Appellant has assigned two errors, one of which challenges the appointment of the civilian judges on this Court as violating the Constitution. That assignment has been rejected by the U.S. Court of Appeals for the Armed Forces, *United States v. Edmond*, 41 M.J. 419 (1995), *Petition for Certiorari* filed, 63 U.S.L.W.3861 (U.S. 25 May 1995)(NO. 94-1931), and it has been rejected by this Court numerous times. As before, it is again found to be without merit. Appellant's other assigned error asserts that the introduction of improper sentencing evidence resulted in a

sentence more severe than otherwise would have been imposed.

The evidence of which Appellant complains is a letter report of civil arrest for assaulting a police officer and resisting arrest included in a presentencing exhibit of extracts from Appellant's personnel record offered by the trial counsel and admitted without objection. Appellant cites *United States v. Zengel*, 32 M.J. 642, 643-644 (CGCMR 1991) in support of his argument that admission of this allegation of wrongdoing, without a showing of it's final determination, was error. *Zengel* does stand for that proposition; however, in that case the document was admitted in evidence over the accused's objection. Here, there was no objection at trial and the Government asserts waiver. Appellant claims that even without objection, there must be corrective action because admission of the document constituted plain error.

We disagree. As pointed out by the Government, plain error is a clear or obvious error that materially affects a substantial right. *United State v. Olano*, _ U.S. _, 113 S. Ct. 1770 (1993); *United States v. Toro*, 37 M.J. 313, 316-317 (C.M.A 1993). The Government correctly notes that, "[i]t is neither clear nor obvious that the admission of the final page of Prosecution exhibit 2, which consisted of 19 pages of personnel records, affected the military judge's determination of an appropriate sentence or that it affected a substantial right of appellant." Gov. Brief at 4. Appellant was convicted of serious offenses for which a maximum punishment of 173 years confinement was authorized. In recognition, of the potential severity of the sentence, Appellant pled guilty in return for a promise by the convening authority to approve no more than 15 years of confinement. The judge imposed approximately half of what the convening authority could have approved. We are convinced that the document

reflecting a civil arrest had no adverse impact on the sentence. Admission of that document did not constitute plain error. Appellant's failure to object at trial waived the issue.

We have reviewed the record in accordance with Article 66, UCMJ. Upon such review, the findings and sentence are determined to be correct in law and fact and on the basis of the entire record should be approved. Accordingly, the findings of guilty and sentence, as approved and partially suspended below, are affirmed.

Chief Judge Baum, Judge Fearnow, and Judge O'Hara concur.

APPENDIX L

UNITED STATES COURT OF
APPEALS FOR THE ARMED FORCES

USCA Dkt. No. 96-0401/CG
Crim. App. No. 1053

United States, Appellee

v.

Donald H. Venable (422-31-6594), Appellant

ORDER

On further consideration of the granted issue (Daily Journal March 15, 1996), in light of *United States v. Ryder*, 44 MJ 9 (1996), it is, by the Court, this 21st day of May, 1996,

ORDERED;

That the decision of the United States Coast Guard Court of Criminal Appeals is affirmed.

For the Court,

/s/
John A. Cutts, III
Deputy Clerk of the Court

APPENDIX M

UNITED STATES COAST GUARD
COURT OF CRIMINAL APPEALS

Washington, DC

UNITED STATES

v.

Donald H. Venable
Seaman Apprentice, U.S. Coast Guard

CGCMG 0099

Docket No. 1053

7 DECEMBER 1995

General Court-Martial convened by Commander, Fifth Coast Guard District. Tried at Fifth Coast Guard Group District, Portsmouth, Virginia on 5 July 1995.

Military Judge: CAPT Lane I. McClelland, USCG

Trial Counsel: LCDR Jeffrey C. Good, USCG

Detailed Defense Counsel: LT Robert F. Johnson, JAGC, USNR

Civilian Defense Counsel: David L. Roberts, Esquire

Appellate Defense Counsel: LCDR Allen Lotz, USCG

Appellate Government Counsel: LT Frank R. Levi, USCGR

BEFORE
PANEL FOUR
BAUM, O'HARA, AND WIESE
Appellate Military Judges

Per Curiam:

Appellant, citing *Ryder v. United States*, 115 S. Ct. 2031 (1995), has summarily assigned as error that this Court lacks jurisdiction to act in this case because of the service on the Court of a civilian judge who has not been appointed in accordance with the Appointments Clause of the Constitution and that the memorandum reappointment of that judge by the Secretary of Transportation is ineffective. This assignment has been rejected previously by this Court, *United States v. Hill*, 42 M.J. 725 (C.G.Ct.Crim.App. 1995), and it is again found to be without merit.

Without admitting that the findings and sentence are correct in fact and law, Appellant has submitted his case on its merits as to any and all issues in addition to the foregoing summary assignment of error. In this regard, we have reviewed the record in accordance with Article 66, UCMJ. Upon such review, the findings and sentence are determined to be correct in law and fact and on the basis of the entire record should be approved. Accordingly, the findings of guilty and sentence, as approved and partially suspended below, are affirmed.

Chief Judge Baum and Judges O'Hara and Wiese concur.

Supreme Court, U.S.
FILED
OCT 11 1996
CLERK

(2)

No. 96-262

In the Supreme Court of the United States

OCTOBER TERM, 1996

JON E. EDMOND, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF FOR THE UNITED STATES IN OPPOSITION

WALTER DELLINGER
Acting Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

PETER J. PLOCKI
Attorney
Department of Transportation
Washington, D.C. 20590

FRANK R. LEVI
Lieutenant, USCGR
Appellate Government Counsel
Commandant (G-LMJ)
United States Coast Guard
Washington, D.C. 20593
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17 pp

QUESTIONS PRESENTED

1. Whether judges of the military Courts of Criminal Appeals (formerly known as the Courts of Military Review) are "inferior" rather than principal officers within the meaning of the Appointments Clause.

2. Whether the Secretary of Transportation has statutory authority to appoint judges to the Coast Guard Court of Criminal Appeals.

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In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-262

JON E. EDMOND, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The orders of the United States Court of Appeals for the Armed Forces (Pet. App. 1a, 34a, 44a, 48a, 60a, 65a) are unreported. A prior opinion of the Court of Appeals for the Armed Forces regarding petitioner Edmond (Pet. App. 2a-11a) is reported at 41 M.J. 419. The opinion of the United States Coast Guard Court of Military Review (now called the United States Coast Guard Court of Criminal Appeals) regarding petitioner Edmond (Pet. App. 12a-33a) is reported at 37 M.J. 787. The opinions of the Coast Guard Court of Criminal Appeals regarding petitioners Lazenby, Leaver, and Leonard (Pet. App. 35a-43a, 45a-47a, 49a-59a) are reported at 42 M.J. 702, 42 M.J. 599, and 41 M.J. 900. The opinions of the Coast Guard Court of

Criminal Appeals regarding petitioners Nichols and Venable (Pet. App. 61a-64a, 66a-67a) are unreported.

JURISDICTION

The judgments of the United States Court of Appeals for the Armed Forces were entered on May 21 and June 27, 1996. The petition for a writ of certiorari was filed on August 16, 1996. The jurisdiction of this Court is invoked under 10 U.S.C. 867a and 28 U.S.C. 1259(3).

STATEMENT

1. The Appointments Clause states that the President

> shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. Art. II, § 2, Cl. 2. Thus, "[t]he Constitution for purposes of appointment * * * divides all its officers into two classes." *United States* v. *Germaine*, 99 U.S. 508, 509 (1879). "Principal officers are selected by the President with the advice and consent of the Senate. Inferior officers Congress may allow to be appointed by the President alone, by the heads of departments, or by the Judiciary." *Buckley* v. *Valeo*, 424 U.S. 1, 132 (1976) (per curiam).

2. The United States Coast Guard is "a military service and a branch of the armed forces of the United States at all times." 14 U.S.C. 1. "Upon the declaration of war or when the President directs, the Coast Guard shall operate as a service in the Navy, and * * * shall be subject to the orders of the Secretary of the Navy." 14 U.S.C. 3. "[E]xcept when operating as a service in the Navy," however, "[t]he Coast Guard is a part of the Department of Transportation." 14 U.S.C. 1; 49 U.S.C. 108(a).

The Secretary of Transportation possesses general statutory authority to "appoint and fix the pay of officers and employees of the Department of Transportation and [to] prescribe their duties and powers." 49 U.S.C. 323(a). The Secretary is also given broad authority to oversee the Coast Guard at all times when it is not operating as a service in the Navy. Thus, the Commandant of the Coast Guard is directed to "carry out duties and powers prescribed by the Secretary of Transportation" and "reports directly to the Secretary." 49 U.S.C. 108(b). The Secretary of Transportation "may promulgate such regulations and orders as he deems appropriate to carry out the provisions of [Title 14] or any other law applicable to the Coast Guard," 14 U.S.C. 633, and "[f]or the purpose of executing the duties and functions of the Coast Guard the Secretary may * * * do any and all things necessary to carry out the purposes of [Title 14]," 14 U.S.C. 92(i).

3. This case concerns the method of appointment of judges on the Coast Guard Court of Criminal Appeals (formerly known as the Coast Guard Court of Military Review).[1] The Court of Criminal Appeals hears

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[1] Effective October 5, 1994, Section 924(b) of the National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2831, redesignated the several Courts of Mili-

This Court subsequently concluded in *Weiss* that "those serving as military judges must be appointed pursuant to the Appointments Clause." 510 U.S. at 170. All of the trial and appellate judges whose appointments were at issue in *Weiss* were active-duty commissioned officers—a position that requires appointment by the President by and with the advice and consent of the Senate. See *ibid.* This Court recognized that Congress, in Articles 26 and 66 of the UCMJ, 10 U.S.C. 826, 866, did not require a second appointment to the position of military judge before the assumption of judicial duties. 510 U.S. at 170-171, 176. The Court also concluded that the Appointments Clause itself does not require a second appointment before military officers may discharge the duties of military judge. *Id.* at 172-176. The Court noted, however, that "[t]he constitutionality of the provision allowing civilians to be assigned to Courts of Military Review, without being appointed pursuant to the Appointments Clause, obviously presents a quite different question." *Id.* at 170 n.4 (citing Art. 66(a), UCMJ, 10 U.S.C. 866(a)).

One Term after its decision in *Weiss*, this Court issued its decision in *Ryder* v. *United States*, 115 S. Ct. 2031 (1995). The government conceded in *Ryder* that the Judge Advocate General's appointment of civilian members to the Coast Guard Court of Criminal Appeals did not comply with the Appointments Clause. See 94-431 U.S. Br. at 9 n.9. The government argued, however, that Ryder's conviction should be affirmed notwithstanding the defect in the civilian judges' appointments. See 115 S. Ct. at 2036-2037. This Court disagreed, holding that Ryder was "entitled to a hearing before a properly appointed panel of" the Coast Guard Court of Criminal Appeals.

Id. at 2038. The Court did not address the validity of the secretarial appointments of January 15, 1993.[4]

On remand, the Court of Appeals for the Armed Forces "concluded that it was necessary to determine whether the present Coast Guard Court of Criminal Appeals is properly constituted before remanding Ryder's case to that court for further proceedings." *United States* v. *Ryder*, 44 M.J. 9, 10 (1996). In resolving that question, the court first held that judges of the Court of Criminal Appeals were "inferior" officers within the meaning of the Appointments Clause. *Id.* at 10-11. "Applying a functional analysis to appellate military judges," the court observed, *inter alia*, that "the jurisdiction of judges of the Court of Criminal Appeals is limited to violations of the Uniform Code of Military Justice and the Law of War by persons subject to military jurisdiction"; that military appellate judges "do not enjoy tenure"; and that those judges "may hold other positions as their primary duty and serve only part-time as appellate military judges." *Ibid.*

The court "turn[ed] next to the question whether Congress has given the Secretary of Transportation authority to appoint judges of the Court of Criminal Appeals." 44 M.J. at 11. The court concluded that the secretarial appointments were valid, explaining that "Congress has given the Secretary of Transportation broad authority in 49 U.S.C. § 323(a) to 'appoint . . . officers and employees of the Department of Transportation.' In our view, this includes civilian judges of the Coast Guard Court of Criminal Appeals." *Ibid.*

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[4] The decision of the Coast Guard Court of Military Review in *Ryder* was issued before the secretarial appointments of January 15, 1993. See 115 S. Ct. at 2034.

4. Each of the petitioners in this case was convicted by a court-martial. In each case the conviction and sentence was affirmed, in whole or in part, by the Coast Guard Court of Criminal Appeals (or its predecessor the Court of Military Review). Chief Judge Baum participated in each case. The decision in each case was issued after the January 15, 1993, secretarial appointments. Pet. 8. The Court of Appeals for the Armed Forces affirmed in each case, relying on its decision on remand in *Ryder*. Pet. 9; see Pet. App. 1a, 34a, 44a, 48a, 60a, 65a.

ARGUMENT

The Secretary of Transportation is a "Head[] of Department[]" within the meaning of the Appointments Clause, see 5 U.S.C. 101; 49 U.S.C. 102(a) and (b); *Freytag* v. *Commissioner*, 501 U.S. 868, 886 (1991), who may be vested by Congress with the power to appoint "inferior Officers." Petitioners contend that the Secretary's appointments of judges to the Coast Guard Court of Criminal Appeals are invalid because (1) those judges are principal officers who must be appointed by the President by and with the advice and consent of the Senate (Pet. 11-13), and (2) even if the judges are inferior officers whose appointment by the Secretary of Transportation would be constitutionally permissible, the Secretary lacked statutory authority to appoint them (Pet. 13-16). Those contentions are incorrect and do not warrant review by this Court.

1. Application of the functional approach described in *Morrison* v. *Olsen*, 487 U.S. 654, 671-673 (1988), indicates that judges of the Coast Guard Court of Criminal Appeals are inferior rather than principal officers. Like the independent counsel whose status

was at issue in *Morrison*, those judges are "subject to removal by a higher Executive Branch official." *Id.* at 671. See *Weiss*, 510 U.S. at 193 (Souter, J., concurring) (noting that "Court of [Criminal Appeals] judges have no fixed term of office"); *Ryder*, 44 M.J. at 11 (Court of Criminal Appeals judges "do not enjoy tenure and thus may be reassigned to other duties"). Those judges, moreover, are "empowered by the [UCMJ] to perform only certain, limited duties," *Morrison*, 487 U.S. at 671, and their "office is limited in jurisdiction," *id.* at 672. As the Court of Appeals for the Armed Forces observed, "the jurisdiction of judges of the Court of Criminal Appeals is limited to violations of the Uniform Code of Military Justice and the Law of War by persons subject to military jurisdiction." *Ryder*, 44 M.J. at 10-11. Even with respect to those cases falling within its jurisdiction, the decision of the Court of Criminal Appeals is not dispositive, but is subject to further review by the Court of Appeals for the Armed Forces. See Art. 67(a), UCMJ, 10 U.S.C. 867(a).[5]

The Uniform Code of Military Justice does not require that judges of the Courts of Criminal Appeals be appointed by the President and confirmed by the Senate. See Art. 66, UCMJ, 10 U.S.C. 866. The statutory scheme thus reflects an implicit determination that those judges are not principal officers. That judgment should not lightly be disregarded. See *Weiss*, 510 U.S. at 194 (Souter, J., concurring) ("Since

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[5] By contrast with the Court of Criminal Appeals, judges of the Court of Appeals for the Armed Forces are appointed by the President, by and with the advice and consent of the Senate, for a fixed term of approximately 15 years. See Art. 142(b)(1) and (2), UCMJ, 10 U.S.C. 942(b)(1) and (2).

the chosen method for selecting military judges shows that neither Congress nor the President thought military judges were principal officers, and since in the presence of doubt deference to the political branches' judgment is appropriate, I conclude that military judges are inferior officers for purposes of the Appointments Clause.").

Finally, the question presented is not of sufficient importance to warrant this Court's review. The Coast Guard Court of Criminal Appeals decides only 20 to 30 cases per year. See Pet. 9. Although the UCMJ authorizes the use of civilian judges on the Courts of Criminal Appeals, see Art. 66(a), UCMJ, 10 U.S.C. 866(a), no branch of the Armed Forces other than the Coast Guard has chosen to utilize them. In light of the fact-specific nature of the inquiry, see *Morrison*, 487 U.S. at 671-673, the Court's resolution of this case would be unlikely to affect the status of large numbers of government officials; nor do petitioners contend that the lower courts are divided with respect to the general principles governing Appointments Clause analysis.

2. a. The appointments at issue here fall within the literal terms of the Secretary's statutory authority. The Secretary of Transportation is empowered to "appoint and fix the pay of officers and employees of the Department of Transportation and [to] prescribe their duties and powers." 49 U.S.C. 323(a).[6] In addi-

[6] The Secretary has possessed that appointment authority since the creation of the Department of Transportation. See Pub. L. No. 89-670, § 9(a), 80 Stat. 944. Petitioners note that the Secretary is given specific statutory authorization to appoint particular officers within the Department of Transportation, see Pet. 14 (citing 49 U.S.C. 102(e), 104(b)(2) and (3), and 105(b)), and contend that "[n]one of these provisions would

tion to the general grant of authority over the Department as a whole, he is charged with oversight of the Coast Guard at all times when it is not operating as a service in the Navy. The Commandant of the Coast Guard is directed to "carry out duties and powers prescribed by the Secretary of Transportation," and he "reports directly to the Secretary." 49 U.S.C. 108(b). The Secretary may "promulgate such regulations and orders as he deems appropriate to carry out the provisions of [Title 14] or any other law applicable to the Coast Guard," 14 U.S.C. 633, and "[f]or the purpose of executing the duties and functions of the Coast Guard the Secretary may * * * do any and all things necessary to carry out the purposes of [Title 14]," 14 U.S.C. 92(i). Those provisions give the Secretary of Transportation ample statutory authority to appoint judges to the Coast Guard Court of Criminal Appeals.

b. It is true that Article 66(a) of the UCMJ, 10 U.S.C. 866(a), provides that each service's Judge Advocate General "shall establish a Court of Criminal Appeals" and "shall designate as chief judge one of the appellate military judges of the Court of Criminal Appeals established by him."[7] That provision does

be necessary if 49 U.S.C. § 323(a) were read literally." Pet. 14. Each of the provisions cited by petitioners, however, authorizes the Secretary of Transportation to appoint a particular officer "with the approval of the President," a qualification not included in the general grant of authority under Section 323(a).

[7] "Although Article 66 does not specifically state that the Judge Advocate General of the respective service will designate the members of the Military Courts of [Criminal Appeals], * * * [t]hat is how the statute has been interpreted since its passage." *United States* v. *Prive*, 35 M.J. 569, 571 (C.G.C.M.R. 1992). See also *Weiss*, 510 U.S. at 169 (judges of the Courts of

not, however, withdraw statutory authority to appoint such judges from any other official who possesses it. To construe Article 66(a) as divesting the Secretary of Transportation of that power would be particularly anomalous in light of the subordinate position of the Judge Advocate General within the Department. The Judge Advocate General of the Coast Guard is the General Counsel of the Department of Transportation. Art. 1(1), UCMJ, 10 U.S.C. 801(1). The General Counsel is directed by statute to "carry out duties and powers prescribed by the Secretary," 49 U.S.C. 102(e), and could presumably be directed by the Secretary to appoint a particular individual to the Court of Criminal Appeals. To read Article 66(a) as divesting the Secretary of his power to appoint military judges within the Department would make sense only if that power were given to an official outside the Secretary's control. The Judge Advocate General is not such a person.

c. Recognition of the Secretary's appointment power furthers the purposes of the statutory scheme as a whole. Article 66(a) expressly provides that members of the Courts of Criminal Appeals "may be commissioned officers or civilians"; Congress thus sought to preserve the services' flexibility by ensuring that a wider pool of potential judges would possess the statutory qualifications. See note 2, *supra*. The Judge Advocate General, however, is not a "Head of Department." Though he may assign to military judgeships persons already commissioned as military officers, he lacks constitutional authority to

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Criminal Appeals "are selected and assigned to serve by the appropriate Judge Advocate General") (citing Art. 66, UCMJ, 10 U.S.C. 866).

appoint civilian judges to military courts. See page 6, *supra*. If Article 66(a) were construed as divesting the Secretary of Transportation of his statutory authority to appoint departmental officers and to administer the Coast Guard, and as conferring upon the Judge Advocate General exclusive authority to select members of the Coast Guard Court of Criminal Appeals, the use of civilian judges would be effectively precluded despite Congress's express approval of their use.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1996

Supreme Court, U.S.
FILED
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CLERK

No. 96-262

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

JON E. EDMOND,

Petitioner,

v.

THE UNITED STATES OF AMERICA
AND OTHER CASES

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Armed Forces

BRIEF OF PETITIONERS

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QUESTIONS PRESENTED

1. May the Secretary of Transportation use a general residual appointment statute to appoint civilian members of the Coast Guard Court of Criminal Appeals, where another statute specifically applies to such appointments, but cannot be used because it admittedly violates the Appointments Clause?

2. Are judges of the military Courts of Criminal Appeals "inferior officers" under the Appointments Clause even though, as a practical matter, their decisions are almost always the final word on criminal convictions in the military?

LISTING OF PARTIES PURSUANT TO RULE 24.1(b)

Jon E. Edmond, U.S. Coast Guard
USCAAF Dkt. No. 93-1292/CG
CGCCA Dkt. No. 999

Jake A. Lazenby, U.S. Coast Guard
USCAAF Dkt. No. 95-0941/CG
CGCCA Dkt. No. 1025

Michael B. Leaver, U.S. Coast Guard
USCAAF Dkt. No. 95-0909/CG
CGCCA Dkt. No. 946

James A. Leonard, U.S. Coast Guard
USCAAF Dkt. No. 95-0702/CG
CGCCA Dkt. No. 1039

Robert J. Nichols, U.S. Coast Guard
USCAAF Dkt. No. 95-1130/CG
CGCCA Dkt. No. 1045

Donald H. Venable, U.S. Coast Guard
USCAAF Dkt. No. 96-0401/CG
CGCCA Dkt. No. 1053
United States of America

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-262

JON E. EDMOND,

Petitioner,

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THE UNITED STATES OF AMERICA AND OTHER CASES

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Armed Forces

BRIEF OF PETITIONERS

OPINIONS BELOW

The opinions of the lower courts in these six cases, including the citations to all published opinions, are identified in the petition (pp. 1-3) and included as appendices to the petition (Pet. App. 1a-67a). The opinion of the United States Court of Appeals for the Armed Forces in *United States v. Ryder*, 44 M. J. 9 (1996), which explains the reasoning of that Court and is the basis on which the decisions under review were rendered, was not reproduced in the petition,

but is reproduced as an Addendum to this brief (Add. A1-A5) for the convenience of the Court.[1]

JURISDICTION

The decisions of the Court of Appeals for the Armed Forces were issued on May 21 and June 27, 1996. The jurisdiction of this Court is invoked under Article 67a of the Uniform Code of Military Justice, 10 U.S.C. § 867a (Supp. II 1990) and 28 U.S.C. § 1259(3) (Supp. II 1990). The petition was filed on August 16, 1996, and review was granted on November 8, 1996.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Appointments Clause, U.S. Const. Article II, § 2, cl. 2, provides:

> The President . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

[1] Effective October 5, 1994, the name of the United States Court of Military Appeals was changed to the United States Court of Appeals for the Armed Forces, and the names of the service Courts of Military Review were changed to the Courts of Criminal Appeals. National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 924, 108 Stat. 2663, 2831 (1994). This brief will refer to those Courts generically under their current names and will use the actual name of the Court when referring to a particular decision.

The relevant provisions of the Uniform Code of Military Justice, Article 66, 10 U.S.C.A. § 866 (West 1995), provide in pertinent part:

> (a) Each Judge Advocate General shall establish a Court of Criminal Appeals which shall be composed of one or more panels, and each such panel shall be composed of not less than three appellate military judges. For the purpose of reviewing court-martial cases, the court may sit in panels or as a whole in accordance with rules prescribed under subsection (f). Any decision of a panel may be reconsidered by the court sitting as a whole in accordance with such rules. Appellate military judges who are assigned to a Court of Criminal Appeals may be commissioned officers or civilians, each of whom must be a member of a bar of a Federal court or of the highest court of a State. The Judge Advocate General shall designate as chief judge one of the appellate military judges of the Court of Criminal Appeals established by him. The chief judge shall determine on which panels of the court the appellate judges assigned to the court will serve and which military judge assigned to the court will act as senior judge on each panel.
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> * * *
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> (c) In a case referred to it, the Court of Criminal Appeals may act only with respect to the findings and sentence as approved by the convening authority. It may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine

controverted questions of fact, recognizing that the trial court saw and heard the witnesses.

* * *

(e) The Judge Advocate General shall, unless there is to be further action by the President, the Secretary concerned, the Court of Appeals for the Armed Forces, or the Supreme Court, instruct the convening authority to take action in accordance with the decision of the Court of Criminal Appeals. If the Court of Criminal Appeals orders a rehearing but the convening authority finds a rehearing impracticable, he may dismiss the charges.

* * *

(f) The Judge Advocates General shall prescribe uniform rules of procedure for Courts of Criminal Appeals and shall meet periodically to formulate policies and procedure in regard to review of court-martial cases in the offices of the Judge Advocates General and by the Courts of Criminal Appeals.

The relevant provision of Title 49 of the United States Code, 49 U.S.C. § 323(a) (1988), provides:

> The Secretary of Transportation may appoint and fix the pay of officers and employees of the Department of Transportation and may prescribe their duties and powers.

STATEMENT OF THE CASE

This is a consolidated proceeding involving six Coast Guard members of varying ranks whose court-martial convictions were affirmed by the Court of Appeals for the Armed Forces on May 21 and June 27, 1996. *See, supra* at page ii. In each case, that Court granted review and rendered adverse summary dispositions in light of *United States v. Ryder*, 44 M.J. 9 (1996). Each case is factually

distinct, but the facts critical to a resolution of the issue presented to each are identical. Each case involved conviction and sentence by a general or special court-martial. Each case was reviewed in the Coast Guard Court of Criminal Appeals by a panel consisting of commissioned officers and at least one civilian judge.[2]

Knowledge of three military cases is necessary to a full understanding of the issues presented in this case: *Weiss v. United States*, 114 S. Ct. 752 (1994); *Ryder v. United States*, 115 S. Ct. 2031 (1995); and *United States v. Ryder*, 44 M.J. 9 (1996). In *Weiss*, this Court upheld the decision of the Court of Military Appeals which had affirmed the petitioners' conviction. The petitioners argued that the appointments of the military trial and appellate judges who heard and reviewed his case had not been made in compliance with the Appointments Clause of the Constitution. *Weiss*, 114 S. Ct. at 754-55. This Court concluded that the Appointments Clause applied to the appointment of military trial and appellate judges, but that appointment as a commissioned officer of the armed forces, with the advice and consent of the Senate, satisfies the Appointments Clause for those judges who are commissioned officers on active duty. Id. at 757, 760. However, the Court specifically noted that its ruling did not apply to the appointment of civilians to service courts of military review: the "constitutionality of the provision allowing civilians to be assigned to Courts of Military Review, without being appointed pursuant to the Appointments Clause, obviously presents a quite different question. See Art. 66(a), UCMJ, 10 U.S.C. 866(a). It is not at issue here." *Id.* at 757 n.4.

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[2]In recent years, only the Coast Guard has had civilian appellate judges, although the Navy has had civilian appellate judges in the past. 2 F. Gilligan & F. Lederer, *Court-Martial Procedure* 140 n.99 (1991). Judges who preside at courts-martial are military officers. Article 26 UCMJ, 10 U.S.C. § 826.

On January 15, 1993, shortly after the decision of the Court of Military Appeals in *Weiss*, the Secretary of Transportation signed a memorandum which "adopted" the prior appointments of the Coast Guard Court of Military Review judges as "appointments of [his] own." *See United States v. Carpenter*, 37 M.J. 291, 300 (C.M.A. 1993). This memorandum, a copy of which is attached in the Addendum to this brief at A6, was prepared and signed by the Secretary upon the suggestion of the judges of the Coast Guard Court of Military Review. *United States v. Senior*, 36 M.J. 1016, 1018 (C.G.C.M.R. 1993).

In *Carpenter*, the Court of Military Appeals considered the validity of the pre-January 15, 1993 appointment of civilian Court of Military Review judges. 37 M.J. at 293. Until that date, the civilian judges on the Coast Guard Court of Military Review, including Chief Judge Baum who sits on all cases in that Court, were appointed by the General Counsel of the Department of Transportation, who also serves as the Judge Advocate General of the Coast Guard, which is part of the Transportation Department. The Court of Military Appeals concluded that civilian appointments to the Courts of Military Review were defective because the appointment was not made by any of the officers specifically empowered in the Appointments Clause to appoint inferior officers — the President, the head of a department, or a court of law. Id. at 295. However, the Court concluded that no relief was necessary, because, relying on *Buckley v. Valeo*, 424 U.S. 1 (1976), it afforded *de facto* validity to the acts of the civilian judges. The Court also referred to the January 15, 1993, memorandum of the Secretary of Transportation purporting to appoint the judges of the Coast Guard Court of Military Review, including Chief Judge Baum, and suggested that this remedied the Appointments Clause violation because the Secretary of Transportation is the head of the Department in which the Coast Guard is lodged. *Carpenter*, 37 M.J. at 294 n.1.

This Court addressed the propriety of affording *de facto* validity to the acts of unconstitutionally appointed appellate military judges in *Ryder v. United States*, 115 S.Ct. 2031 (1995). The Court concluded that the *de facto* officer doctrine did not apply to the acts of the improperly-appointed civilian judges, at least in criminal cases in which the issue was raised while the case was on direct review. *Ryder* required new reviews by the Coast Guard Court of Criminal Appeals with properly-appointed judges for all cases still on direct review that were decided before the January 15, 1993, memorandum of the Secretary of Transportation.

Both *Carpenter* and *Ryder* were decided by the Coast Guard Court of Military Review before January 15, 1993. Therefore, the validity of the memorandum of the Secretary of Transportation issued on that date, which purports to appoint the civilian judges of that Court, was not at issue, and the comment in *Carpenter* suggesting its validity was simply *dicta*.

On remand from this Court in *Ryder*, the Court of Appeals for the Armed Forces, as part of its decision to remand the case to the Coast Guard Court of Criminal Appeals, considered whether Chief Judge Baum, the remaining civilian judge on the Coast Guard Court, is now properly appointed by virtue of the Secretary's January 15, 1993 memorandum. The Court concluded that judges of the Courts of Criminal Appeals are inferior officers of the United States, and that the Secretary of Transportation has the statutory authority to appoint those judges. *Ryder*, 44 M.J. at 11. The Court relied on Justice Souter's concurring opinion in *Weiss* for its determination that the judges of the Courts of Criminal Appeals are inferior officers. *Id.; Weiss*, 114 S. Ct. at 769 (Souter, J., concurring). For its conclusion that the Secretary had authority to appoint civilian judges, the Court cited 49 U.S.C. § 323(a), the general statutory provision permitting the Secretary of Transportation to appoint subordinates in the Department of Transportation. *Ryder*, 44 M.J. at 11-12. As a result, it remanded *Ryder* to

the Coast Guard Court of Criminal Appeals where Ryder's conviction was to be reviewed again, this time by a panel who would, in the opinion of the Court of Appeals for the Armed Forces, be properly appointed, even if it included Chief Judge Baum.

In each of the cases now before the Court, the court-martial conviction and sentence was affirmed by a panel of three judges of the Coast Guard Court of Criminal Appeals or Court of Military Review, depending on when the decision was rendered. Each panel included Chief Judge Baum, a civilian, and two other judges. In *Lazenby* and *Leonard* the panels also included Judge Bridgman, the Coast Guard Court's other civilian judge, who has since retired. The other judges in these cases were active-duty commissioned officers. Each of the decisions was issued after January 15, 1993, so that the appointment of the civilian judges was covered by the Secretary's 1993 memorandum and the *dicta* in *Carpenter*. On further discretionary appeal to the Court of Appeals for the Armed Forces, solely on the Appointments Clause issues, that Court affirmed, relying on its recent decision on remand in *Ryder*.

SUMMARY OF ARGUMENT

The first question decided by the Court of Appeals and presented in the petition was the constitutional question whether judges of the military Courts of Criminal Appeals are principal or inferior officers, and the second question was whether the statutory authority relied on by the Government could be used to appoint civilian judges to the Coast Guard Court of Criminal Appeals. In this brief we reverse that order since it is preferable for courts to decide cases on statutory rather than constitutional grounds whenever possible. Moreover, the existence of a substantial constitutional question provides a further reason for the Court to read the applicable statutes in order to avoid reaching the constitutional challenge.

1. Under Article 66(a) of the UCMJ, Congress provided that the Judge Advocate General for each of the armed services, including the Coast Guard, is to appoint military appellate judges, and that direction was uniformly followed since its passage in 1951 until January 1993. By contrast, 49 U.S.C. § 323(a), relied on by the Government, is a general residual appointment provision, which makes no mention of military judges and which was first invoked only after the constitutional status of civilian appellate judges in the Coast Guard was challenged. In cases such as this, the Court has applied the specific statute to the exclusion of the general one, and it should do so here, especially since there is nothing in the legislative history of either provision that would lead to a contrary conclusion.

Furthermore, accepting the rationale urged by the Government would mean that some members of the Coast Guard Court of Criminal Appeals would be appointed by the General Counsel of the Transportation Department and others, including the Chief Judge, by the Secretary of Transportation, an unusual if not unprecedented situation. The incongruity of such a result is underscored, among other things, by the fact that Article 66(a) also provides that the Judge Advocate General shall select the Chief Judge of that service's Court of Criminal Appeals and that the power to issue rules of practice for all the military Courts of Criminal Appeals is lodged collectively in all of the Judge Advocates General. Article 66(f).

2. If the Court rejects petitioners' statutory claims, it should nonetheless reverse because the judges of the Courts of Criminal Appeals are principal officers under the criteria set forth in *Morrison v. Olson*, 487 U.S. 654 (1988). Their appointments are for indefinite terms, and while some military officers tend to serve relatively brief tours as military appellate judges, the civilians on the Coast Guard Court of Criminal Appeals serve for quite lengthy periods. Most significantly, the Courts of Criminal Appeals have a wide-ranging power of review of both convictions and

sentences in courts-martial that is broader than the federal Courts of Appeals have in non-military criminal cases. Their jurisdiction requires them to consider the entire UCMJ, other provisions of federal and in some cases state criminal law, as well as applicable provisions of the Constitution. And, there is no one who is "superior" to them since there is no appeal as of right to a higher court from their decisions. The only further review is discretionary by the United States Court of Appeals for the Armed Forces.

This Court's decision in *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868 (1991), confirms the conclusion that judges of the Courts of Criminal Appeals are principal not inferior officers. In *Freytag*, the issue was whether, if special trial judges of the Tax Court were inferior officers (as the Court held), were they properly appointed by the Chief Judge of the Tax Court (as the Court also held). For purposes of this case, *Freytag*'s significance is that the Court implicitly ruled that the Chief Judge of the Tax Court is a principal officer, since only those principal officers listed in the Appointments Clause may appoint inferior officers.

To determine whether the judges of the military Courts of Criminal Appeals are principal officers, the Court should compare the relevant aspects of the powers, responsibilities, and terms of office of Tax Court judges and those on the Courts of Criminal Appeals. In most respects, the offices are quite similar, but the fact that decisions of the Tax Court are reviewable as of right in Circuit Courts of Appeals, whereas those of the military appellate courts are subject to only discretionary review, makes the case for designating military appellate judges principal officers at least as strong, if not stronger, than for concluding that Tax Court judges have that status.

ARGUMENT

THE CIVILIAN JUDGES WERE NOT LAWFULLY APPOINTED TO THE COAST GUARD COURT OF CRIMINAL APPEALS.

I. THE SECRETARY OF TRANSPORTATION HAS NO STATUTORY AUTHORITY TO APPOINT COAST GUARD MILITARY APPELLATE JUDGES.

The Appointments Clause permits the appointment of inferior officers by means other than Presidential nomination and Senate confirmation only when Congress has so provided "by Law." U.S. Const. Art. II, § 2, cl. 2. Even then, Congress may lodge the appointment power for inferior officers only in one of the three categories of principal officers designated in the Constitution — the President alone, the head of a department, or a court of law. *Id.* Absent such a law, the authority to appoint remains with the President, subject to the advice and consent of the Senate. Similarly, if Congress provides for the appointment of an inferior officer, but assigns the power to a person not listed in the Appointments Clause, that provision has no effect, and the residual appointment power of the President, with the advice and consent of the Senate, applies. *Id.*; *Appointment of Assistant Assessors of Internal Revenue*, 11 Op. Att'y Gen. 209 (1865). As this Court has held, there is no inherent authority in the head of a department to make appointments of officers in that department. *United States v. Perkins*, 116 U.S. 483 (1886).

The current version of Article 66(a), which creates the Courts of Criminal Appeals, does not contain the term "appoint," but instead uses "establish," which is similar to the term "constitute" used in the prior version. Despite this arguable ambiguity, for more than forty years since the UCMJ was enacted, the practice was uniformly clear: until

January 15, 1993, all military appellate judges were selected for their offices, and in the case of civilian judges, actually appointed to their positions, by the Judge Advocate General of their particular service pursuant to Article 66(a).

Under this longstanding interpretation that Article 66(a) provided a power of appointment, *see United States v. Wheeler*, 6 C.M.R. 464 (1952), the General Counsel of the Department of Transportation, who is the Judge Advocate General of the Coast Guard, Article 1(1), UCMJ, 10 U.S.C. § 801(1), appointed all the judges of its appellate court, civilian and military, including its current Chief Judge, Joseph H. Baum, who has held that position since April 1, 1985. Add. A6. This consistent practice changed on January 15, 1993, when the Secretary of Transportation, at the urging of all of the judges of the Coast Guard Court of Military Review, *see Senior v. United States*, 36 M. J. 1016, 1018 (C.G.C.M.R. 1993), reappointed all of the Coast Guard's appellate judges in order to avoid the Appointments Clause problems raised in *United States v. Weiss*, 36 M.J. 224 (C.M.A. 1992). Add. A6. That appointment "adopted" the five judicial appointments of the General Counsel of April 20, 1992 "as judicial appointments of my own" and included both Judge Baum, who was appointed as Chief Judge, and Alfred Bridgman, another civilian who has since retired. *Id.* Although the appointments are not for stated terms of office, the civilian appellate judges in the Coast Guard have had very long tenures.[3]

Although not cited in the appointing memorandum, the statute relied upon by the Government to support the Secretary's appointments here is 49 U.S.C. § 323(a). That

[3] In addition to Chief Judge Baum, who has already served nearly 12 years, Alfred Bridgman served almost 17 years (September 1978 - July 1995), Clinton Maguire served almost nine years (August 1969 - May 1978), and Arthur Rosenwasser served more than 26 years (June 1951 - December 1977). Throughout this period, the Chief Judge has always been a civilian.

statute does not mention the office of appellate military judge, or even the Coast Guard. It is a general provision that would appear to permit the Secretary of Transportation to "appoint and fix the pay" of *all* "officers and employees of the Department of Transportation ... ." It may be used to justify the appointment of Judge Baum only if (a) military appellate judges are inferior officers, *and* (b) the statute applies to that office. In Point II we explain why judges of the Courts of Criminal Appeals are principal officers, but the existence of that substantial constitutional question is a further basis to construe § 323(a) in a manner that will enable the Court to avoid having to decide that question. *Department of Justice v. Public Citizen*, 491 U.S. 440, 465-66 (1989). In this section of the brief, we demonstrate that this catch-all provision cannot reasonably be construed to apply to these appointments, even if it were constitutional to do so.

A. Properly Construed, 49 U.S.C. § 323(a) Does Not Permit the Appointment of Coast Guard Military Appellate Judges.

Initially, we note that the statute relied on by the Government does not mention the office to be filled, or even describe with some particularity the category of covered officers, and thus arguably does not satisfy the "by law" requirement of the Appointments Clause. The provision for appointing inferior officers is an exception to the general rule, and was carefully considered by the Framers because of a concern about excessive diffusion of power and hence accountability. *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 884-85 (1991). Surely, a catch-all appointment provision such as this does not constitute a considered judgment that any officer, let alone one as significant as a military appellate judge, should not be appointed by the usual means provided in the Constitution. And since most persons who work for the federal

government are neither principal nor inferior officers, but are employees whose appointments are not covered by the Appointments Clause, insisting on some degree of specificity in a law creating an alternate appointment mechanism will not present any significant practical problems.

But the Court need not decide that 49 U.S.C. § 323(a) does not support the appointment on that ground alone because there are far more fundamental reasons for rejecting the Government's interpretation, based on Article 66 of the UCMJ and other parts of Title 49. These provisions make clear, as we demonstrate below, that control over the appointment of military appellate judges was never intended to be lodged in the heads of their departments, but in the Judge Advocates General of the respective services.

Until *Weiss* caused the military to focus on the Appointments Clause, everyone treated Article 66(a) as the basis for appointing military appellate judges. Although it cannot constitutionally be used to appoint civilian judges, its existence is highly relevant because it brings forth the well-settled rule of statutory interpretation that, if two provisions deal with the same subject, one general in its application and the other specific, and the two provisions are in conflict, the specific provision governs. *Busic v. United States*, 446 U.S. 398, 406 (1980).

That is exactly the situation here. Both statutory provisions concern the appointment of officers of the United States within the Department of Transportation. One provision is general and one specific in terms of appointment of officers, and they would be in conflict if they both provided for different methods of appointing the same officers. Therefore, the specific provision, Article 66(a), must be given effect over the general provision, 49 U.S.C. § 323(a). As we now show, this reading is substantially bolstered by Article 66 as a whole and by the quite incongruous results that would occur if §323(a) were read as the Government suggests.

Article 66. The first and most striking anomaly is that some members of the Coast Guard Court of Criminal Appeals would be appointed by the General Counsel of the Department and the others by the Secretary, who is the General Counsel's superior. It is unusual, to say the least, for there to be different appointing authorities for members of the same appellate tribunal, or even of comparable non-judicial bodies, and it should not be assumed that Congress intended that result without a clear statement to that effect and some indication why Congress was doing so, neither of which exist. Indeed, allowing the Secretary to appoint civilian judges would enable him to overwhelm the military appointees since the General Counsel could hardly resist if the Secretary wanted to fill any vacancies that occurred with civilian rather than military appointees.

Apparently, the Secretary recognized this incongruity, and thus his 1993 appointment covered all five appellate judges for the Coast Guard — civilian and military. But that only compounds the problem because the statute is quite clear that only the President can appoint Coast Guard officers, 14 U.S.C. § 211(a), and under Article 66(a) only the Judge Advocate General can assign them to military courts. It may be that the attempt to appoint the military officers to the Court of Military Review was mere surplusage, and did not destroy a prior valid appointment, but at least it strongly suggests that Congress did not intend to create this double appointment system.

Second, under Article 66(a), the Judge Advocate General has the duty to "designate" the Chief Judge, yet here the Secretary has purported to take that assignment from his subordinate. Aside from any possible confusion of responsibilities, it would be extremely unusual for a lower ranking officer to choose among appointees, some made by him and others by his superior, for the position of Chief Judge for the Coast Guard Court of Criminal Appeals. Yet that is precisely what would happen if the specific mandates of Article 66(a) were followed, and if the Secretary were

allowed to appoint civilian members of the Court of Criminal Appeals.

Third, aside from specific incongruities in the appointments for the Courts of Criminal Appeals, the approach taken in Article 66 is to place military appellate judges under the overall supervision of the Judge Advocates General, not others in their Departments. Since these entities are appellate tribunals, dealing with the lives and liberties of persons convicted by courts-martial, it made great sense for Congress to remove them from the control of the Secretaries of the Departments, who are the penultimate (before the President) superiors of those who have brought the charges in the first instance.

Not only does that allocation of power minimize the possibility of undue Secretarial influence, but it also helps assure that those chosen for positions as military appellate judges are selected by individuals who are well-qualified to evaluate the quality of the legal work of the potential appointees. Given the apparent rationale for choosing the Judge Advocates General for this role, and the absence of any legislative history suggesting the contrary, there is no reason why Congress would authorize a different method of appointment when civilian judges were to be chosen. Furthermore, whenever any person is assigned a duty with respect to the Courts of Criminal Appeals — including the power to issue rules of procedure under Article 66(f) — the designee is a Judge Advocate General.

Indeed, it is difficult to believe that Congress, with no hearings and no input from the Coast Guard or its Judge Advocate General, let alone from the Code Committee established by 10 U.S.C. § 946 for the purpose of reviewing the military justice system and making recommendations to Congress about it, significantly altered the appointment process for appellate judges in the Coast Guard, and did so without mentioning that fact in the statute or, as we show below, in its legislative history. Despite all of this, the Government contends that Congress intended to allow the

Secretary to step into this carefully constructed system and appoint civilian judges, including the Chief Judge, who sits on every Coast Guard case, based solely on the catch-all language in § 323(a).

Yet another incongruity is based on what is *missing* from the comparable statutes governing the other military services. The Government seems to argue that, in enacting § 323(a), Congress intended to create a fallback system for the appointment of civilian appellate military judges. Although the Coast Guard was expected to be the principal user of civilian appellate judges, Article 66(a) is not limited to them, and there have been civilians on the Navy's appellate court. *See supra* note 2. To the best of our knowledge, there is no provision comparable to § 323(a) anywhere in Title 10 that would allow the civilian appointment of judges for the appellate tribunals for the other armed services. It is conceivable that, despite the mandate in Article 66(a) that civilian appellate judges for all four Courts of Criminal Appeals are to be appointed by their Judges Advocates General, Congress provided a fallback appointment power for the Coast Guard, but it is highly unlikely that it did so for the Coast Guard, but for no other service. Far more likely is that Congress never considered that § 323(a) would be used for this purpose. Given the specificity of Article 66(a), the Government's attempt to avoid the constitutional problem in following its mandate should not be permitted.

Title 49. There are a number of problems that would arise under Title 49 if § 323(a) were construed as the Government urges. First, reading § 323(a) in that sweeping a manner would mean that even the appointment of *principal* officers of the Department by the Secretary would be permitted, which would clearly be a violation of the Appointments Clause. Indeed, a number of officers who appear to be principal officers are specifically required to be appointed in the manner provided for principal officers. These include the Federal Aviation Administrator (49 U.S.C.

§ 106), the head of the National Highway Traffic Safety Administration (*id.* § 105), and the members of the Surface Transportation Board (*id.* § 701), which is the successor to the Interstate Commerce Commission. Surely, § 323(a) cannot be applied to them.

Similarly, the impropriety of using this statute for the appointments at issue here is apparent from several other provisions that relate to appointments of inferior officers of the Department. For example, the Secretary is permitted to appoint the Assistant Secretary for Administration under 49 U.S.C. § 102(e); the Deputy Federal Highway Administrator under § 104(b)(2); the Assistant Administrator of the Federal Highway Administration under § 104(b)(3); and the Deputy Administrator of the National Highway Traffic Safety Administration under § 105(b). These provisions would all be surplusage if § 323(a) were read as the Government urges. Therefore, there must be an implied, common sense exception in 49 U.S.C. § 323(a): the statute does not apply if the appointment of an officer is otherwise provided for by law. But that takes the Government back to the problem that caused the Secretary to attempt to appoint appellate military judges himself: their appointment *is* otherwise provided for in Article 66(a) of the UCMJ, but that provision is unconstitutional as applied to the appointment of civilians judges.

The last clause in § 323(a) further supports the position urged by petitioners -- that the entire provision does not apply when Congress has otherwise specifically spoken on the issue. That clause permits the Secretary, with respect to those officers and employees whom he is authorized to appoint and to fix their pay, to "prescribe their duties and powers." If the Government is correct that § 323(a) applies to the Coast Guard Court of Criminal Appeals, then the Secretary may also alter the duties of the civilian judges that he appoints and, by the same token, appoint the military judges and alter their powers and duties also, despite the clear mandates of Article 66. And, presumably, he could

also change the duties and pay for the other statutory officers in the Department noted on pages 17-18, *supra*. There is, however, nothing in § 323(a) that gives a hint that Congress intended to confer such sweeping authority in what is essentially a housekeeping measure. Thus, both Article 66 and Title 49 compel the conclusion that there is no basis to read § 323(a) to allow the Secretary to appoint civilians to the Coast Guard Court of Criminal Appeals. And, as we show below, although legislative history is not needed to establish this proposition, it "confirms" this analysis. *See Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 267 (1991).[4]

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[4]Under 49 U.S.C. § 324(b) the Secretary may appoint, assign, or detail Coast Guard officers to positions in the Transportation Department, with three enumerated exceptions for high level positions, whose appointments are otherwise provided for in the Department of Transportation Act. The exceptions are for the position of Secretary, which must be filled by the President with the advice and consent of the Senate (§102(b)); the Deputy Secretary, who is similarly appointed (§102(c)); and the Assistant Secretary for Administration, who must be "appointed in the competitive service by the Secretary, with the approval of the President" (§102(2)). The absence of an exclusion for the Coast Guard Court of Criminal Appeals should not suffice to overcome the alternative specific method of appointment otherwise provided for by Article 66(a), both because it is in a different Title of the U.S. Code (and hence may have been overlooked) and because it would still leave other incongruities noted in the text. In any event, it would not cure the problem of civilian appointments, unless the individual was a retired Coast Guard officer, who was also qualified to serve as a military judge. *See* § 324(b)(final sentence) and Article 66(a) (requiring bar membership). And, of course, use of this provision would still have to reconciled with the specific requirements of Article 66(a).

B. The Legislative History Confirms That § 323(a) Does Not Permit the Appointment of Civilian Appellate Military Judges.

There are two statutes whose legislative histories might support the Government's position, but in fact neither of them does. Thus, the history of § 323(a) might reveal an intent to apply in situations such as this, or the history of Article 66 might argue for a more narrow reading of its reach. However, to the extent that their origins shed any light on the question presented, they tend to favor petitioners.

The history of § 323(a) begins with the history of the Coast Guard. The U.S. Coast Guard originated as the United States Revenue Cutter Service, created by Congress as part of the Department of the Treasury, in the Tariff Act of August 4, 1790 (1 Stat. 175). On May 26, 1906, in an act providing for the regulation of enlistment and punishments in the Revenue Cutter Service, Pub.L. 59-178, 34 Stat. 200 (1906), Congress provided the first statutory authority for a system of disciplinary law within the Service. 27 *The Coast Guard at War*, 1 (1951) (hereinafter "*Coast Guard at War*"). The Act provided for Revenue Cutter Service courts to punish only twenty-one specified misdemeanor-type offenses, and it required the Secretary of the Treasury to turn over offenders who committed more serious crimes to the civilian authorities.

In the historical context in which the Act of 1906 was passed, the judgment of a court-martial was essentially a recommendation, without effect until reviewed and acted upon by the officer that convened the court in the first place. *See* Winthrop, *Military Law and Precedents*, 447 (2d ed 1920). Consistent with the prevailing approach to military justice, the Act provided that all courts were convened by the Secretary of Treasury, and the proceedings, findings, and sentences were subject to review by the Secretary. Indeed, no portion of any punishment imposed by the courts could be executed until approved by the Secretary, and the Secretary

interpreted these duties to be non-delegable. *See generally, Coast Guard Courts and Boards § 590 (1935) (hereinafter "Coast Guard Courts").* While the Secretary was required to make a "review," the review was not a judicial one. Neither the Act of 1906, nor the Secretary's own guidebooks for implementation of the Act, specified whether particular standards of review applied, nor mentioned a scope of review, spoke of the purpose of the review, or actually guaranteed a person convicted by a general or summary court an opportunity to be heard post-trial as a matter of right. *See Coast Guard Courts* at §§ 590-600. The statute did not require, or even mention, that post-trial review should be conducted by appellate courts or boards. Once the Secretary of Treasury took action and a sentence was approved, there was literally no other tribunal to which an appeal could have been taken. *Id.* at §34.

The Revenue Cutter Service was combined with the Life Saving Service to form the Coast Guard in 1915, and was declared to be "a military service and a branch of the armed forces of the United States at all times." Act of January 28, 1915 (38 Stat. 800), 14 U.S.C. §1. Thereafter, the Act of June 5, 1920 established lesser courts known as "deck courts", but neither that Act nor any subsequent legislation made any other changes in the system by which courts-martial were reviewed in the Coast Guard until the UCMJ was enacted in 1950.[5]

This history of no meaningful appellate review in the Coast Guard prior to the UCMJ makes it clear that, if Congress intended to assign the Secretary of Transportation any role in the appellate processes of the Coast Guard court-

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[5]The Coast Guard was transferred from the Department of Treasury to the Navy on November 1, 1941, which resulted in a temporary shift in its disciplinary system to that of the Articles for the Government of the Navy. After World War II was over, the Coast Guard was returned to the Department of Treasury. *See Coast Guard at War* at 1, 4.

martial system, it would have had to have done so in the statutes creating the Transportation Department. But a review of that legislation fails to produce any such evidence.

What is now § 323(a) was originally §9(a) of the Department of Transportation Act of 1966, which established the Department and moved the Coast Guard into it. Pub. L. 89-670, §9(a), 80 Stat. 931 (1966). It provided:

> In addition to the authority contained in any other Act which is transferred to and vested in the Secretary, the National Transportation Safety Board, or any other officer in the department, the Secretary is authorized, subject to the civil service and classification laws, to select, appoint, employ, and fix the compensation of such officers and employees *as are necessary to carry out the provisions of this Act* and to prescribe their authority and duties. (Emphasis added).

This provision was later codified at 49 U.S.C. §1657(a).

In 1982, Congress revised Title 49 for the purpose of restating "in comprehensive form, without substantive change" certain general and permanent laws related to transportation." Office of the Law Revision Counsel, Detailed Explanation of Revision of Title 49 U.S.C.A., reprinted in 1982 U.S. Code, Cong., & Admin News 4220. The revision was part of a program to substitute plain language for awkward and outdated provisions, and to eliminate superseded, obsolete, or unneeded statutes. Certain provisions were consolidated "to conform to common contemporary usage." *Id.* at 4221. As part of this change, 49 U.S.C. §1657(a) was revised into the current 49 U.S.C. § 323(a), to read:

> The Secretary of Transportation may appoint and fix the pay of officers and employees of the Department of Transportation and may prescribe their duties and powers.

Nothing in this history suggests that the Secretary was being given any powers whatsoever regarding courts-martial appeals, either from the Treasury Department or from

Congress directly in 1966 or 1982. If anything, the overall thrust of the 1966 provision emphasizes that it was little more than a catch-all device, designed to assure that nothing fell between the cracks in the transfer process. Indeed, the phrase governing the appointment power applies only to those which "are necessary to carry out the provisions of this Act," could quite reasonably be read not to apply at all here since these appointments are made to carry out another act, the UCMJ of 1950. We do not ask the Court to decide this case on the basis of that phrase alone, but we do believe that this history reinforces the conclusion that § 323(a) has nothing to do with appointing civilian judges for the Coast Guard Court of Criminal Appeals.

That leaves the UCMJ's provisions on appeals as a possible source for the appointment power exercised here, or at least for some evidence that Congress did not intend to confine the appointment process for military appellate judges to that contained in Article 66(a). Once again, however, nothing in the history of Article 66 helps the Government.

The original language of Article 66(a), effective May 31, 1951, stated that the "Judge Advocate General of each of the armed forces shall constitute in his office one or more boards of review, each composed of not less than three officers or civilians... ." In its Report, the Armed Services Committee made a special comment relevant to these newly created Boards: if adopted, the Code "will be the sole statutory authority for...[t]he review of findings and sentence and the creation and constitution of the reviewing tribunals." Senate Committee on Armed Forces, Uniform Code of Military Justice Act of 1950, S. Rep. No. 486, 81st Cong., 2d Sess. (1949), reprinted in 1950 U.S.C.C.S. 2223. Regarding the role of the Coast Guard in the formulation of the language of Article 66, the Committee noted that "the provision permitting civilian members has been added for the Coast Guard." *Id.*

Since its implementation, this portion of Article 66(a) dealing with the creation of military appellate tribunals was

twice modified. The Military Justice Act of 1968 changed the phrase "shall constitute in his office one or more boards of review" to read, "shall establish a Court of Military Review which shall be composed of one or more panels. . . ." Pub. L. 90-632, § 866 (1968). The other amendment was simply a name change to the Court of Criminal Appeals from the Court of Military Review. Pub. L. 103-337, § 924 (1994).

Once again, this history provides no support for the proposition that Article 66(a) should be read as anything but the exclusive means by which individuals may become members of military appellate tribunals. No one disputes that, since 1951, all appointees to the Coast Guard appellate tribunals and to those of the other services were made by the Judge Advocates General pursuant to Article 66(a), and that nothing was changed in 1966 when the Transportation Department was created, nor in 1982, when minor changes were made to what is now § 323(a). Furthermore, the Senate Committee that spoke directly to the issue of alternative appointments of civilian judges expressed its belief that the amendment was needed to authorize their appointment, thereby eliminating any doubt that there was any pre-1951 authority that might have been carried forward. In sum, the legislative history confirms that Article 66(a) is the sole source of appointments for the Courts of Criminal Appeals and that 49 U.S.C. §323(a) contains no authorization for the Secretary of Transportation to cure the constitutional deficiency in Article 66(a) as applied to civilian judges.

Finally, reading § 323(a) as conferring appointing authority in the manner proposed by the Government is at odds with the principle that the lines of appointment be clearly marked. For one thing, the Government's argument trivializes the office of appellate military judge by suggesting that Congress intended that civilian military judges be appointed pursuant to a catch-all provision empowering the Secretary of Transportation to appoint employees and officers of the Department. Insofar as we are aware, no one

occupying a comparable position of responsibility — which calls for literally the exercise of life-or-death power over military personnel like petitioners — is appointed under such a generalized, residual appointing statute. To the contrary, most judges are appointed pursuant to highly specific grants of authority that clearly identify the appointing official and set forth a process for the appointment. It is not simply a matter of erroneous statutory interpretation to accept the Government's interpretation of § 323(a), but an affront to the principle of accountability underlying the Appointments Clause to rely on a general statute when Congress clearly intended a completely different law to apply.

II. THE JUDGES OF THE COURTS OF CRIMINAL APPEALS ARE PRINCIPAL OFFICERS WHO MUST BE APPOINTED BY THE PRESIDENT WITH THE ADVICE AND CONSENT OF THE SENATE.

If this Court rejects petitioners' statutory argument, then it must decide whether the judges of the Coast Guard Court of Criminal Appeals are principal officers of the United States, who must be appointed by the President with the advice and consent of the Senate, not by the Secretary of Transportation. There is almost no constitutional history that sheds light on the meaning of the term inferior officer, and the only decision of this Court that deals directly with the issue is *Morrison v. Olson*, 487 U.S. 654 (1988), with which we begin our discussion. Thereafter, we turn to *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868 (1991), where, although the Court did not speak on this precise issue, the assumptions underlying both of the opinions further support our claim. In our analysis of both cases, we will refer to the concurring opinion of Justice Souter in *Weiss*, 114 S. Ct. at 763-769, which concluded that all military judges are inferior officers.

As Justice Story observed, "In the practical course of the government there does not seem to have been any exact line drawn, who are and who are not to be deemed *inferior* officers, in the sense of the constitution, whose appointment does not necessarily require the concurrence of the senate." 1 J. Story, *Commentaries on the Constitution of the United States: A Preliminary Review* § 1536 p. 337 (2d ed 1851)(emphasis in original). This Court's decision in *Morrison* made the line somewhat clearer by ruling that principal officers are not limited to those specified as such in the Constitution. Nor are they limited to those listed in the Constitution as offices to which Congress may assign the power of appointing inferior officers, although the implicit assumption is that *at least* those who have the power of appointing inferior officers must themselves be principal officers.[6]

Since *Morrison* held that independent counsels are inferior officers, we first focus on the characteristics of that

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[6]We recognize that Justice Souter in *Weiss* observed that "it may be that the Appointments Clause envisions the appointment of some inferior officers by other inferior officers," 114 S. Ct. at 768. However, there was no citation for that proposition, and it seems fundamentally inconsistent with the admitted purpose of confining the appointing power to those designated in the Appointments Clause itself, to prevent the diffusion of power and hence accountability. *Freytag*, 501 U.S. at 884-85. It is also inconsistent with the little constitutional history on this issue. Thus, James Madison unsuccessfully objected to the limitation on appointments of inferior officers because it did "not go far enough if it be necessary at all — Superior Officers below Heads of Departments ought in some cases to have the appointment of the lesser offices." 2 *The Records of the Federal Convention of 1787* 627 (M. Farrand rev. 1966). Of course, inferior officers may appoint "employees" of the United States since they do not need to meet the requirements of the Appointments Clause. *Freytag*, 501 U.S. at 881.

office and then compare them to the position of military appellate judges. As we read *Morrison*, the most significant factors in favor of treating independent counsels as inferior officers were the strict limits on the jurisdiction of her office, the limited term of the office, and the presence of a readily identified superior officer to whom the independent counsel was required to look for guidance on matters within her jurisdiction and who had the power to remove her for cause. 487 U.S. at 671-72. While the characteristics of the office of military appellate judge and independent counsel are quite different, a comparison between them demonstrates that the former have at least as much, if not more, unsupervised authority under the laws of the United States than do the latter.

Subject matter jurisdiction: Independent counsels are limited in the areas of their investigations to what the Attorney General recommends, and then to what the Special Division authorizes them to investigate. Indeed, the statute prescribes a fairly narrow group of persons who can be made the subject of an independent counsel's investigation, and even then only some federal crimes can trigger an appointment of an independent counsel. 28 U.S.C. § 591(a) & (b). If additional crimes turn up during an investigation, the independent counsel must seek permission to expand her jurisdiction to include them.

By contrast, the judges of the Courts of Criminal Appeals hear the entire range of criminal appeals involving violations of the entire UCMJ, as well as other federal and states laws. Thus, Article 134, 10 U.S.C. § 934, proscribes "all disorders and neglects to the prejudice and good order and discipline in the armed forces," as well as "crimes and offenses not capital," which has been construed to include other federal crimes not covered in the UCMJ, including violations of state law which are covered by the Assimilative Crimes Act, 18 U.S.C. § 13. And, like other appellate tribunals reviewing criminal convictions, military appellate

judges are regularly faced with constitutional challenges that must be resolved.

Term of Office: Independent counsel's offices are intended to exist as entities for only brief periods of time, generally a year or two, although several have lasted considerably longer. Many of those who have been appointed as independent counsels have not assumed the office as a full-time job, although some have. And when the investigation that led to their appointment is concluded, it is not just the person who was named as independent counsel whose work is completed, but the entire office is terminated.

By contrast, Article 66(a) requires the permanent establishment of Courts of Criminal Appeals for each branch of the armed services. Chief Judge Baum, who sits on every appeal, has served since 1985, and when he leaves or, more likely, retires, he will be replaced by another judge; other civilian judges in the Coast Guard have also served lengthy terms, running from nearly nine years to over twenty-six. *See* note 3, *supra*. This pattern suggests that at least civilian appellate judges can be expected to remain in office as long as they continue to perform competently. Although military appellate judges in the Coast Guard tend to serve shorter periods of time, and they generally have other non-judicial assignments, their positions continue to be filled when they are no longer serving as judges, just the same as other federal offices, except temporary ones like independent counsels.

Supervision by Others: Although independent counsels are appointed by a court, they may be removed only by the Attorney General for cause. 28 U.S.C. § 596(a)(1). Most significantly, independent counsels are required to follow Justice Department policies and procedures in carrying out their duties, *id.* § 594(f), so that they are, in essence, an arm of the Justice Department, but with added independence based on their appointment and the limitation on their removal except for cause.

But the greatest contrast with independent counsels is the total lack of supervision by anyone, including the appointing officers, over the daily work of the Courts of Criminal Appeals. To be sure, like independent counsels, they do not make policy, and the discretion they exercise is very different from policymakers in the executive branch. But those differences apply to all judges, even those with Article III status who are clearly principal officers. Like the Circuit Courts of Appeals, there is no other court to which an appeal of right can be taken by military personnel who are convicted by a court-martial. Thus, absent waiver by an accused, the Courts of Criminal Appeals are required to review all cases in which the death penalty, confinement for one year or more, a dismissal, or a dishonorable or bad-conduct discharge is part of the approved sentence. Article 66(b).

This review is particularly important because the powers of the Courts of Criminal Appeal are far broader than those of the Circuit Courts of Appeals in comparable federal criminal cases. Thus, under its controlling statute, a Court of Criminal Appeals "may affirm only such findings of guilty and the sentence as it finds correct in law and fact . . .. [I]t may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact[.]" Article 66(c). Specifically, it "may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses." *Id.* In short, military appellate judges exercise all of the traditional powers of appellate courts, as well as an "awesome, plenary, *de novo* power of review[.]" *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990).

Furthermore, if the judges of the Courts of Criminal Appeals are inferior officers, who are their superiors? The services, including the officers who appoint the judges of the Courts of Criminal Appeals, are bound to carry out their decisions unless reversed or modified in some way by a superior court. *See* Arts. 66(e), 75, UCMJ. The decisions

of the Courts of Criminal Appeals, in the vast majority of cases, are subject to review only upon the grant of a petition for review by the Court of Appeals for the Armed Forces, Art. 67(a), UCMJ, 10 U.S.C. § 867(a), and from FY 1991 though FY 1994 that Court decided between 2 and 4% of the number of cases decided by the Courts of Military Review. See *Annual Reports*, the U.S. Court of Military Appeals and the Judge Advocates General of the Army, Navy, Air Force and Coast Guard, *reprinted at* 32 M.J. CXXV-CXCVIII; 34 M.J. LXIII-CXLIII; 38 M.J. CXXI-CXCIII; 39 M.J. CIX-CLXXV; and 43 M.J. CLXXXIX-CCLXII. Moreover, that power of review is limited to actual cases, unlike the routine supervisory authority that Department Heads exercise over those who work for them.[7]

Another key factor present in *Morrison* is absent here. In both the original independent counsel statute passed in 1978 and in its two short-term renewals, *Morrison*, *supra*, 487 U.S. at 660 n.1, Congress made a "considered judgment" that independent counsels were inferior officers, consistent with the requirements of the Appointments Clause. *In re Sealed Case*, 838 F.2d 476, 532 (D.C. Cir. 1987)(R. Ginsburg, J., dissenting). Here, as described in Point I, there was never any discussion of the Appointments Clause status of military appellate judges, let alone a specific determination by Congress, based on the powers that military appellate judges exercise, that they were inferior and not principal officers.[8]

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[7] Review of decisions in a court-martial is available in this Court only where the Court of Appeals for the Armed Forces has reviewed the case. 28 U.S.C. § 1259.

[8] The absence of consideration of the Appointments Clause may be due to the fact that Article 66 was enacted in 1950 and amended in 1968, both before this Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976), put real teeth into that Clause and made (continued...)

To the extent that the Court deems it appropriate to give Congress some deference on its interpretation of the Appointments Clause as applied to the status of particular offices — on the theory that at least the Senate is surrendering some power by giving up the right to advise and consent on particular nominations — such deference should apply only when Congress has made an explicit judgment on the issue, as it did in *Morrison*. While it may be true, as Justice Souter observed in his concurrence in *Weiss*, that Congress and the President "didn't think [military judges] were principal officers," *Weiss*, 114 S. Ct. at 769, that is because they did not think about the question at all, not because they weighed all the relevant evidence regarding the status of military appellate judges and reached the contrary conclusion.

This Court's post-*Morrison* decision in *Freytag* further supports our position that military appellate judges are principal officers. The issue in *Freytag* of relevance here was whether special trial judges, appointed by the Chief Judge of the Tax Court, were appointed in accordance with the Appointments Clause. After rejecting the Commissioner's argument that the judges were mere employees, the Court unanimously upheld their appointment, although the Court divided 5-4 on whether the Tax Court was a court of law or a department under the Appointments Clause.

Although Justice Souter has suggested otherwise (*see*, *supra* note 6), we believe that implicit in the notion of a limited category of officials who can be designated the power to appoint inferior officers is that all of those appointing persons are themselves principal officers. To rule otherwise would suggest that, although the Framers were willing to

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[8](...continued)
it clear that it is the exclusive means by which all officers of the United States must be appointed. *Id.* at 126.

allow only a small group of officers to substitute for the President in the appointment process, and to do so without Senate oversight on individual appointees, it was willing to allow persons who were not themselves principal officers, and hence not subject to Presidential appointment and Senate confirmation, to appoint inferior officers, if Congress agreed. In our view, the far more logical assumption is that the Framers carefully constructed a hierarchy in which principal officers are all appointed as provided by the basic Appointments Clause process and that only those who have been through that process, and otherwise meet the restrictions on persons to whom the appointment power may be delegated by law, may appoint inferior officers. On that basis, the judges of the Tax Court must be principal officers in order for the Chief Judge to be entitled to appoint special trial judges.

Tax Court judges are appointed by the President with the advice and consent of the Senate, 26 U.S.C. § 7443, but that fact alone is not dispositive since the Constitution requires that all officers, inferior as well as principal, be appointed in that manner, unless Congress decides, "by Law," to permit an alternative method to be used for a particular office. The Government never suggested in *Freytag* that Tax Court judges were *not* principal officers, and given the breadth of their tasks and the importance of their work, we doubt that any such claim could be sustained. Indeed, this Court analogized Tax Court judges to District Court judges who surely are principal officers. 501 U.S. at 891-92.

But if judges of the Tax Court are principal officers, then the civilian and military judges of the Courts of Criminal Appeals must be in the same category. The subject matter areas of their respective jurisdictions differ in topics, but not in breadth. While Tax Court judges are appointed for fixed terms, and thus could be said to be more permanent, the positions of the judges on both sets of courts are permanent, and only the appointees come and go, in

contrast to the offices of independent counsel which are, by definition, temporary. Neither the Tax Court nor the Courts of Criminal Appeals have day-to-day supervisors, or for that matter anyone who gives them policy directives of any kind, outside the context of decisions in specific cases.

But if there is a single factor that distinguishes military appellate courts from the Tax Court, it is that there is an appeal as of right to a Circuit Court of Appeals from every Tax Court decision, whereas decisions of the Courts of Criminal Appeals are reviewable only by permission, which is not often granted. And the Courts of Criminal Appeals decide on the liberty and in some cases the life of the accused, in contrast with the Tax Court whose cases deal only with money. Accordingly, if Tax Court judges are principal officers, then the case for military appellate judges having that same status is *a fortiori*.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed, and the case remanded so that a properly constituted panel of the Coast Guard Court of Criminal Appeals can hear the appeals of these six petitioners.

Respectfully submitted,

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December 23, 1996

ADDENDUM

UNITED STATES, Appellee,
v.
James D. RYDER, Boatswain's Mate Second Class
U.S. Coast Guard, Appellant.

No. 68449
CMR No. 947

U.S. Court of Appeals for
the Armed Forces

Argued Oct. 31, 1995.

Decided April 15, 1996.

Opinion of the Court

GIERKE, Judge:

A general court-martial convicted Boatswain's Mate Second Class Ryder of numerous drug offenses. His approved sentence provided for a dishonorable discharge, confinement for 3 years, partial forfeitures for 36 months, and reduction to the lowest enlisted grade. The Court of Military Review set aside the findings of guilty as to one specification and dismissed it, affirmed the remaining findings of guilty, reassessed the sentence, and found it "legally correct and appropriate for the remaining offenses." 34 MJ 1077, 1082 (1992).

The Court of Military Review subsequently granted Ryder's motion for reconsideration and entertained three additional assignments of error, including an assertion that the appellate military judges on that court were not validly appointed under the Appointments Clause of the Constitution. That court held that its judges were validly appointed. 34 MJ 1259 (1992).

Our Court held in *United States v. Carpenter*, 37 MJ 291, 295 (1993) *vacated*, __ U.S. __, 115 S.Ct. 2572, 132 L.Ed.2d. 823 (1995), that civilian judges on the court below were not validly appointed but their actions were valid *de facto*. *See Buckley v. Valeo*, 424 U.S. 1, 142, 96 S.Ct. 612, 693, 46 L.Ed.2d 659 (1976). We applied *Carpenter* to Ryder's case. *See* 39 MJ

454, 455 n. * (1994). The Supreme Court unanimously reversed, holding that the civilian judges' actions were not valid *de facto*. The Court remanded Ryder's case for another "hearing before a properly appointed panel" of the Coast Guard court. *Ryder v. United States*, _ U.S. __, __, 115 S.Ct. 2031, 2038, 132 L.Ed.2d 136 (1995).

Following remand of the case from the Supreme Court, our Court concluded that it was necessary to determine whether the present Coast Guard Court of Criminal Appeals is properly constituted before remanding Ryder's case to that court for further proceedings. We ordered the Government to show cause whether the Secretary of Transportation has statutory authority to appoint judges of the Coast Guard Court of Criminal Appeals. 43 MJ 181 (1995). We now hold that the judges of that court are validly appointed.

Before our Court, the Government argued that judges of the Court of Criminal Appeals are "inferior officers" of the United States who may be appointed by a department head if authorized by Congress; that the Secretary of Transportation has authority under 49 USC § 323(a) to appoint inferior officers; and that the Secretary of Transportation has properly exercised his appointment power to appoint the judges of the Coast Guard Court of Criminal Appeals. Response to Order to Show Cause at 6-9. Appellate defense counsel argued that appellate military judges are "principal" officers who must be nominated by the President and confirmed by the Senate, Answer at 4-8; in the alternative, he argued that if appellate military judges are "inferior" officers, 49 USC § 323(a) is not a sufficient enabling statute to permit the Secretary of Transportation to appoint appellate military judges. Answer at 9-12. Finally, appellate defense counsel argued that 49 USC § 323(a) and Article 66(a) are "in conflict," since the former is a general grant of authority to the Secretary of Transportation, but the latter is Congress' specific directive to the service Judge Advocates General to appoint judges to the Court of Criminal Appeals. Ryder's counsel argued that Article 66(a) reflects Congress' intent to give the power to appoint judges to the Judge Advocate General, not the Secretary. Answer at 12-15.

In *Weiss v. United States*, 510 U.S. 163, 114 S.Ct. 752, 127 L.Ed.2d 1 (1994) the Supreme Court held that assignment of military officers to judicial duties does not require a second

appointment under the Appointments Clause. Left open was the question whether assignment of a civilian to a Court of Criminal Appeals by the appropriate Judge Advocate General complied with the Appointments Clause. *Id* at ___ n. 4, 114 S.Ct. at 757 n. 4. The Supreme Court has since held in *Ryder v. United States*, *supra*, that it did not.

Two questions are now before us. First, are the judges of the Coast Guard Court of Criminal Appeals principal officers or inferior officers under the Appointments Clause? Second, if they are inferior officers, has Congress given the Secretary of Transportation authority to appoint them?

The line between principal officers and inferior officers is "far from clear." *Morrison v. Olson*, 487 U.S. 654, 671, 108 S.Ct. 2597, 2608-09, 101 L.Ed.2d 569 (1988). The Supreme Court uses a functional analysis to determine whether an officer of the United States is a principal officer or interior officer under the Appointments Clause. *See id.* at 671, 108 S.Ct. at 2608-09. Applying a functional analysis to appellate military judges, we note that the jurisdiction of judges of the Court of Criminal Appeals is limited to violations of the Uniform Code of Military Justice and the Law of War by persons subject to military jurisdiction. The judges are dependent on the General Counsel (who is the Judge Advocate General for the Coast Guard) for assignment to the court. They do not enjoy tenure and thus may be reassigned to other duties. They may hold other positions as their primary duty and serve only part-time as appellate military judges. *See United States v. Carpenter*, 37 MJ at 296.

While good arguments can be made for both sides of the question, we agree with Justice Souter's approach in *Weiss*:

> Since the chosen method for selecting military judges shows that neither Congress nor the President thought military judges were principal officers, and since in the presence of doubt deference to the political Branches' judgement is appropriate, I conclude that military judges are inferior officers for purposes of the Appointments Clause.

_ U.S. at __, 114 S.Ct. at 769 (concurring). *See In re Sealed Case*, 838 F.2d. 476, 532 (D.C.Cir. 1988) (R.B. Ginsberg, J., dissenting), *reversed sub nom. Morrison v. Olson*, *supra*, cited by Justice Souter in *Weiss* ("Where ... the label that better fits an

officer is fairly debatable, the fully rational congressional determination surely merits ... tolerance." __ U.S. at __, 114 S.Ct. at 769); *see also United States v. Weiss*, 36 MJ 224, 240 (CMA 1992) (Sullivan, C.J., dissenting on other grounds) ("Military judges, both trial and appellate, are 'inferior Officers' . . ."). Since military officers assigned to a Court of Criminal Appeals are inferior officers, we conclude that civilian judges assigned to that court, who perform the same duties, are likewise inferior officers and are not required to be appointed by the President and confirmed by the Senate.

We turn next to the question whether Congress has given the Secretary of Transportation authority to appoint judges of the Court of Criminal Appeals. The Government argues that 49 USC § 323(a), empowering the Secretary to "appoint . . . officers and employees of the Department of Transportation" enables the Secretary to appoint civilian members of the Court of Criminal Appeals. The defense argues that the 49 USC § 323(a) is overly broad and that Congress intended Article 66, UCMJ, 10 USC § 866, a more specific statue that vests the appointment power in the Judge Advocates General, to control appointments to the Court of Criminal Appeals.

As with other courts, the power to establish a court is separate from the power to appoint judges. In *Weiss v. United States, supra*, the Supreme Court rejected the defense interpretation of Article 66 when it said, "The sections of the UCMJ relating to military judges speak explicitly and exclusively in terms of 'detail' or 'assign'; nowhere in these sections is mention made of a separate appointment." __ U.S. __, 114 S.Ct. at 758. Military officers are appointed by the President, not the Judge Advocate General. *See* 10 USC §§ 531 and 624, and 14 USC § 211. The Judge Advocate General is commanded by Article 66(a) to "establish a Court of Criminal Appeals" and assign judges to that court. Article 66 says nothing about the power to appoint. Accordingly, we reject the argument that Article 66 reflects congressional intent to vest in the Judge Advocate General the power to appoint appellate military judges.

In *United States v. Carpenter*, 37 MJ at 294, we opined that "the Appointments Clause would be satisfied if the Secretary of Transportation appointed the judges of the Coast Guard Court of Military Review." We adhere to that view. Congress has given

the Secretary of Transportation broad authority in 49 USC § 323(a) to "appoint . . . officers and employees of the Department of Transportation." In our view, this includes civilian judges of the Coast Guard Court of Criminal Appeals. The Secretary's adoption of the General Counsel's assignment of military officers to the Court of Criminal Appeals may have been redundant but does not affect the validity of his appointment of civilians as appellate military judges. Accordingly, we hold that the Secretary's appointment of civilians as appellate military judges is consistent with the Appointments Clause.

In accordance with the Supreme Court's mandate, the decision of the United States Coast Guard Court of Military Review [34 MJ 1077, 1259] is set aside. The record of trial is returned to the General Counsel of the Department of Transportation for review under Article 66, Uniform Code of Military Justice, 10 USC § 866, by a properly appointed Court of Criminal Appeals. Thereafter, Article 67, UCMJ, 10 USC § 867 (1989) will apply.

Chief Judge COX, Judges SULLIVAN and CRAWFORD, and Senior Judge EVERETT concur.

Memorandum

U.S. Department of Transportation

Office of the Secretary of Transportation

Subject: APPOINTMENT OF APPELLATE MILITARY JUDGES
Date: January 15, 1993

From: S/
The Secretary

Reply to Attn of:

To: Chief Judge, U.S. Coast Guard Court of Military Review

1. The assignment of appellate military judges to the Coast Guard Court of Military Review, as reflected in the General Counsel's memo of April 20, 1992, is adopted this date as judicial appointments of my own. Those judges presently assigned and appointed by me are:

Chief Judge
Joseph H. Baum

Judges
Alfred F. Bridgman, Jr.
Michael C. Grace
Terrance M. Edwards

The judicial duties and powers of these judges will be as prescribed under the Uniform Code of Military Justice.

DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
UNITED STATES GOVERNMENT

memorandum

Subject: UNITED STATES COAST GUARD COURT OF MILITARY REVIEW

Date: March 18, 1985

From: General Counsel

To: Chief Counsel, U.S. Coast Guard

1. The United States Coast Guard Court of Military Review, established by memorandum of General Counsel of August 12, 1969, and amended by subsequent memoranda, and as reestablished by memorandum of the General Counsel of April 12, 1977, is continued. However, the following additional amendment is made concerning personnel assigned as appellate military judges effective 1 April 1985:

Mr. Joseph H. Baum;
Mr. Alfred F. Bridgman, Jr.;
Captain Christopher M. Holland, USCG;
Captain Frederick F. Burgess, Jr., USCG; and
Commander Robert J. Reining, USCG.

2. Effective 1 April 1985, Mr. Joseph H. Baum is designated as Chief Judge of the Court.

3. Cases not yet taken up by the court shall be heard by the court as established with the amendment made by this memorandum. These cases are presently: *United States v. Castelani*; *United States v. Bealieu*; *United States v. Giusti*; *United States v. Beasley*; *United States v. Dubois*; *United States v. Baker*; *United States v. Kurtz*; *United States v. Breseman*; *United States v. Miramontes*; *United States v. Azevedo*; *United States v. Madison*; *United States v. Berry*; *United States v. Payne*; *United States v. Morgan*; *United States v. Miller*; and all others subsequently referred.

Supreme Court, U.S.
FILED
JAN 22 1997
CLERK

No. 96-262

In the Supreme Court of the United States

OCTOBER TERM, 1996

JON E. EDMOND, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether judges of the military Courts of Criminal Appeals (formerly known as the Courts of Military Review) are "inferior" rather than principal officers within the meaning of the Appointments Clause.

2. Whether the judges on the Coast Guard Court of Criminal Appeals who sat on petitioners' cases were appointed in a manner consistent with the relevant statutes.

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In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-262

JON E. EDMOND, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The orders of the United States Court of Appeals for the Armed Forces (Pet. App. 1a, 34a, 44a, 48a, 60a, 65a) are unreported. A prior opinion of the Court of Appeals for the Armed Forces regarding petitioner Edmond (Pet. App. 2a-11a) is reported at 41 M.J. 419. The opinion of the United States Coast Guard Court of Military Review (now called the United States Coast Guard Court of Criminal Appeals) regarding petitioner Edmond (Pet. App. 12a-33a) is reported at 37 M.J. 787. The opinions of the Coast Guard Court of Criminal Appeals regarding petitioners Lazenby, Leaver, and Leonard (Pet. App. 35a-43a, 45a-47a, 49a-59a) are reported at 42 M.J. 702, 42 M.J. 599, and 41 M.J. 900. The opinions of the Coast Guard Court of Criminal Appeals regarding petitioners Nichols and Venable (Pet. App. 61a-64a, 66a-67a) are unreported.

JURISDICTION

The judgments of the United States Court of Appeals for the Armed Forces were entered on May 21 and June 27, 1996. The petition for a writ of certiorari was filed on August 16, 1996, and was granted on November 4, 1996. 117 S. Ct. 416. The jurisdiction of this Court rests upon 10 U.S.C. 867a and 28 U.S.C. 1259(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional and statutory provisions are set forth in an appendix to this brief: the Appointments Clause, U.S. Const. Art. II, § 2, Cl. 2; Article 66 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 866; and 49 U.S.C. 323(a).

STATEMENT

1. The Appointments Clause states that the President

> shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. Art. II, § 2, Cl. 2. Thus, "[t]he Constitution for purposes of appointment * * * divides all its officers into two classes." *United States* v. *Germaine*, 99 U.S. 508, 509 (1879). "Principal officers are selected by the President with the advice and consent of the Senate. Inferior officers Congress may allow to be appointed by the President alone, by the heads of departments," or by the courts. *Buckley* v. *Valeo*, 424 U.S. 1, 132 (1976) (per curiam).

2. The United States Coast Guard is "a military service and a branch of the armed forces of the United States at all times." 14 U.S.C. 1. "Upon the declaration of war or when the President directs, the Coast Guard shall operate as a service in the Navy, and * * * shall be subject to the orders of the Secretary of the Navy." 14 U.S.C. 3. "[E]xcept when operating as a service in the Navy," however, "the Coast Guard is a part of the Department of Transportation." 14 U.S.C. 1; 49 U.S.C. 108(a).[1]

The Secretary of Transportation possesses general statutory authority to "appoint and fix the pay of officers and employees of the Department of Transportation and [to] prescribe their duties and powers." 49 U.S.C. 323(a). The Secretary is also given broad authority to oversee the Coast Guard at all times when it is not operating as a service in the Navy. Thus, the Commandant of the Coast Guard is directed to "carry out duties and powers prescribed by the Secretary of Transportation" and "reports directly to the Secretary." 49 U.S.C. 108(b). The Secretary of Transportation "may promulgate such regulations and orders as he deems appropriate to carry out the

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[1] The Department of Transportation was created in 1966. See Department of Transportation Act, Pub. L. No. 89-670, 80 Stat. 931. Section 6(b)(1) of that Act transferred control over the Coast Guard from the Secretary of the Treasury to the Secretary of Transportation. 80 Stat. 938.

provisions of [Title 14] or any other law applicable to the Coast Guard," 14 U.S.C. 633, and "[f]or the purpose of executing the duties and functions of the Coast Guard the Secretary may * * * do any and all things necessary to carry out the purposes of [Title 14]," 14 U.S.C. 92(i).

3. Pursuant to its power "[t]o make Rules for the Government and Regulation of the land and naval Forces," U.S. Const. Art. I, § 8, Cl. 14, Congress has established three tiers of military courts. See generally *Weiss* v. *United States*, 510 U.S. 163, 166-169 (1994); *Ryder* v. *United States*, 115 S. Ct. 2031, 2037-2038 (1995). At the trial level are the courts-martial. See Art. 16, Uniform Code of Military Justice (UCMJ), 10 U.S.C. 816. "A court-martial is a temporary court, called into existence by a military order and dissolved when its purpose is accomplished." *United States* v. *Weiss*, 36 M.J. 224, 228 (C.M.A. 1992), aff'd, 510 U.S. 163 (1994). See Arts. 22-24, UCMJ, 10 U.S.C. 822-824 (identifying officials who may convene courts-martial).

If the court-martial issues a conviction, the convening authority (the officer who has convened the court-martial) must review the case and take official action on it. See Art. 60, UCMJ, 10 U.S.C. 860. That officer's "authority * * * to modify the findings and sentence of a court-martial is a matter of command prerogative involving the sole discretion of the convening authority." Art. 60(c)(1), UCMJ, 10 U.S.C. 860(c)(1). The convening authority, "in his sole discretion, may approve, disapprove, commute, or suspend the sentence in whole or in part." Art. 60(c)(2),

UCMJ, 10 U.S.C. 860(c)(2).[2] The convening authority may also "dismiss any charge or specification by setting aside a finding of guilty thereto," Art. 60(c)(3)(A), UCMJ, 10 U.S.C. 860(c)(3)(A), or "change a finding of guilty * * * to a finding of guilty to * * * a lesser included offense," Art. 60(c)(3)(B), UCMJ, 10 U.S.C. 860(c)(3)(B).

The intermediate military courts are the four Courts of Criminal Appeals, one each for the Army, Navy-Marine Corps, Air Force, or Coast Guard. See Art. 66, UCMJ, 10 U.S.C. 866; *Weiss*, 510 U.S. at 168. The UCMJ provides that each service's Judge Advocate General "shall establish a Court of Criminal Appeals" and "shall designate as chief judge one of the appellate military judges of the Court of Criminal Appeals established by him." Art. 66(a), UCMJ, 10 U.S.C. 866(a).[3] In the Coast Guard, the Judge Advo-

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[2] Thus, "[t]he convening authority may for any or no reason disapprove a legal sentence in whole or in part, mitigate the sentence, and change a punishment to one of a different nature as long as the severity of the punishment is not increased." Rules for Courts-Martial 1107(d)(1). The convening authority may not, however, increase the punishment imposed by a court-martial. *Ibid.*

[3] As first enacted in 1950, Article 66(a) of the UCMJ required the Judge Advocate General of each branch of the Armed Forces to "constitute in his office one or more boards of review," which would review the decisions of courts-martial. Act of May 5, 1950, ch. 169, 64 Stat. 128. The Military Justice Act of 1968, Pub. L. No. 90-632, § 2(27), 82 Stat. 1341, amended Article 66(a) "by redesignating the boards as 'courts of military review' and by directing each judge advocate general to establish a single court of military review in the place of the 'one or more boards of review' provided for in the present article 66(a)." S. Rep. No. 1601, 90th Cong., 2d Sess. 14 (1968). The 1968 amendments did not change the function or power of the

cate General is the General Counsel of the Department of Transportation. Art. 1(1), UCMJ, 10 U.S.C. 801(1). The UCMJ provides that "[a]ppellate military judges who are assigned to a Court of Criminal Appeals may be commissioned officers or civilians, each of whom must be a member of a bar of a Federal court or of the highest court of a State." Art. 66(a), UCMJ, 10 U.S.C. 866(a).[4]

The Courts of Criminal Appeals hear appeals from the decisions of courts-martial. Unless the defendant waives review, the Courts of Criminal Appeals are required to review all cases in which the sentence, as approved by the convening authority, "extends to death, dismissal of a commissioned officer, cadet, or midshipman, dishonorable or bad-conduct discharge, or confinement for one year or more." Art. 66(b)(1), UCMJ, 10 U.S.C. 866(b)(1). Review may not be waived in a case involving a sentence of death. See Art. 66(b)(2), UCMJ, 10 U.S.C. 866(b)(2). The Court of Criminal Appeals "may affirm only such findings of guilty, and the sentence or such part or amount of the

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Boards of Review, however, or the qualifications of the persons serving on them. Effective October 5, 1994, Section 924(b) of the National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2831, redesignated the several Courts of Military Review as Courts of Criminal Appeals.

[4] The legislative history indicates that the use of civilian judges was authorized by Congress at the request of the Coast Guard, which desired the flexibility, because of its small number of lawyers, to appoint a civilian judge to the court. See S. Rep. No. 486, 81st Cong., 1st Sess. 28 (1949) ("a provision permitting civilian members has been added for the Coast Guard"); *Uniform Code of Military Justice: Hearings on H.R. 2498 Before the Subcomm. of the House Comm. on Armed Services*, 81st Cong., 1st Sess. 1189 (1949) (quoted in *United States* v. *Weiss*, 36 M.J. at 233).

sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." Art. 66(c), UCMJ, 10 U.S.C. 866(c). "In considering the record, [the Court of Criminal Appeals] may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses." *Ibid.*

The highest military court is the Court of Appeals for the Armed Forces (formerly known as the Court of Military Appeals, see National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 924(a), 108 Stat. 2831). That court consists of five judges, Art. 142(a), UCMJ, 10 U.S.C. 942(a), "appointed from civilian life by the President, by and with the advice and consent of the Senate," Art. 142(b)(1), UCMJ, 10 U.S.C. 942(b)(1). Judges on the Court of Appeals for the Armed Forces serve fixed terms of approximately 15 years. Art. 142(b)(2), UCMJ, 10 U.S.C. 942(b)(2). The Court of Appeals for the Armed Forces exercises mandatory jurisdiction over all cases in which the Court of Criminal Appeals has affirmed a death sentence, Art. 67(a)(1), UCMJ, 10 U.S.C. 867(a)(1), and over all cases reviewed by a Court of Criminal Appeals in which the Judge Advocate General has requested further review, Art. 67(a)(2), UCMJ, 10 U.S.C. 867(a)(2). In all other cases reviewed by a Court of Criminal Appeals, the Court of Appeals for the Armed Forces may grant discretionary review upon petition by the defendant. See Arts. 67(a)(3), 67(b), UCMJ, 10 U.S.C. 867(a)(3), 867(b). The Court of Appeals for the Armed Forces is authorized to "take action only with respect to matters of law." Art. 67(c), UCMJ, 10 U.S.C. 867(c).

4. The Coast Guard Court of Criminal Appeals is composed of five appellate judges. The court sits in three-judge panels, with the chief judge sitting in every case unless a conflict of interest prevents his participation. The chief judge performs judicial functions as his primary duty; the four associate judges have other primary duties. See *United States* v. *Kovac*, 36 M.J. 521, 527-528 (C.G.C.M.R. 1992), aff'd mem., 39 M.J. 29 (C.M.A. 1993). The court's case load is by far the smallest of the four Courts of Criminal Appeals. During fiscal year 1995, for example, the Coast Guard Court of Criminal Appeals reviewed a total of 20 cases. *Annual Report of the Code Committee on Military Justice* 71 (Oct. 1, 1994-Sept. 30, 1995).

Four of the five current members of the Coast Guard Court of Criminal Appeals are active-duty commissioned officers in the Coast Guard. Commissioned officers in the Coast Guard are appointed by the President with the advice and consent of the Senate. 14 U.S.C. 211. The court's only current civilian member is Chief Judge Joseph H. Baum, a retired commissioned officer in the Navy who attained the military pay grade of O-6 before retirement and now serves in the civilian pay grade of GS-15. *United States* v. *Carpenter*, 37 M.J. 291, 293-295 (C.M.A. 1993), vacated and remanded, 115 S. Ct. 2572 (1995); *Kovac*, 36 M.J. at 525. Before his retirement from the court, Associate Judge Alfred F. Bridgman, Jr., a retired Coast Guard officer, also served as a civilian member of the Coast Guard Court of Criminal Appeals. See *Kovac*, 36 M.J. at 525. In 1985, the Judge Advocate General of the Coast Guard assigned Chief Judge Baum and Judge Bridgman to serve on the Coast Guard Court of Military Review. See *Kovac*, 36

M.J. at 526; Pet. Br. App. A7. On January 15, 1993, the Secretary of Transportation issued a memorandum stating that "[t]he assignment of appellate military judges to the Coast Guard Court of Military Review, as reflected in the General Counsel's memo of April 20, 1992, is adopted this date as judicial appointments of my own." Pet. Br. App. A6 (reproducing Secretary's memorandum).[5] The memorandum then listed the names of "[t]hose judges presently assigned and appointed by me," including Chief Judge Baum and Judge Bridgman. *Ibid.*; *Carpenter*, 37 M.J. at 294 n.1. The Secretary's issuance of that memorandum appears to have been precipitated by a communication from Chief Judge Baum to the Chief Counsel of the Coast Guard, expressing on behalf of the Coast Guard Court of Military Review the belief that "the Secretary, in his capacity as a cabinet level head of department, [should] reappoint the judges so the Court would be constitutionally valid beyond any doubt." *United States* v. *Senior*, 36 M.J. 1016, 1018 (C.G.C.M.R. 1993).

5. In *Weiss* v. *United States*, this Court discussed the constitutional principles governing the assignment of judges to military courts. The Court first noted the parties' agreement that "military judges, because of the authority and responsibilities they possess, act as 'Officers' of the United States," 510

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[5] The General Counsel's memorandum of April 20, 1992, to which the Secretary alluded, reflected the General Counsel's last assignment of judges to the Coast Guard Court of Military Review before the January 15, 1993, memorandum. No new civilian members have joined the court since the issuance of the January 15, 1993, memorandum. Subsequent assignments of Coast Guard officers to that court have been made by the Judge Advocate General.

U.S. at 169, and that "the Appointments Clause applies to military officers," *id.* at 170. The Court concluded on that basis that "those serving as military judges must be appointed pursuant to the Appointments Clause." *Ibid.*

The petitioners in *Weiss* were United States Marines whose convictions had been affirmed by the Navy-Marine Corps Court of Military Review. 510 U.S. at 165. All of the trial and appellate judges whose appointments were at issue in *Weiss* were active-duty commissioned officers—a position that requires appointment by the President by and with the advice and consent of the Senate. See *id.* at 170. This Court recognized that Congress, in Articles 26 and 66 of the UCMJ, 10 U.S.C. 826, 866, did not require a second appointment to the position of military judge before the assumption of judicial duties. 510 U.S. at 170-171, 176. The Court also concluded that the Appointments Clause itself does not require a second appointment before military officers may discharge the duties of military judge. *Id.* at 172-176. The Court noted, however, that "[t]he constitutionality of the provision allowing civilians to be assigned to Courts of Military Review, without being appointed pursuant to the Appointments Clause, obviously presents a quite different question." *Id.* at 170 n.4 (citing Art. 66(a), UCMJ, 10 U.S.C. 866(a)).

One Term after its decision in *Weiss*, this Court issued its decision in *Ryder* v. *United States*, 115 S. Ct. 2031 (1995). The government conceded in *Ryder* that the Judge Advocate General's appointment of civilian members to the Coast Guard Court of Criminal Appeals did not comply with the Appointments Clause. See 94-431 U.S. Br. at 9 n.9. The government argued, however, that Ryder's conviction

should be affirmed notwithstanding the defect in the civilian judges' appointments. See 115 S. Ct. at 2036-2037. This Court disagreed, holding that Ryder was "entitled to a hearing before a properly appointed panel of" the Coast Guard Court of Criminal Appeals. *Id.* at 2038. The Court did not address the validity of the secretarial appointments of January 15, 1993.[6]

On remand, the Court of Appeals for the Armed Forces "concluded that it was necessary to determine whether the present Coast Guard Court of Criminal Appeals is properly constituted before remanding Ryder's case to that court for further proceedings." *United States* v. *Ryder*, 44 M.J. 9, 10 (1996). In resolving that question, the court first held that judges of the Court of Criminal Appeals were "inferior Officers" within the meaning of the Appointments Clause. *Id.* at 10-11. "Applying a functional analysis to appellate military judges," the court observed, *inter alia*, that "the jurisdiction of judges of the Court of Criminal Appeals is limited to violations of the Uniform Code of Military Justice and the Law of War by persons subject to military jurisdiction"; that military appellate judges "do not enjoy tenure"; and that those judges "may hold other positions as their primary duty and serve only part-time as appellate military judges." *Ibid.*

The court "turn[ed] next to the question whether Congress has given the Secretary of Transportation authority to appoint judges of the Court of Criminal Appeals." 44 M.J. at 11. The court concluded that the secretarial appointments are valid, explaining that

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[6] The decision of the Coast Guard Court of Military Review in *Ryder* was issued before the secretarial appointments of January 15, 1993. See 115 S. Ct. at 2034.

"Congress has given the Secretary of Transportation broad authority in 49 U.S.C. § 323(a) to 'appoint . . . officers and employees of the Department of Transportation.' In our view, this includes civilian judges of the Coast Guard Court of Criminal Appeals." *Ibid.*

6. Each of the petitioners in this case was convicted by a court-martial. In each case the conviction and sentence were affirmed, in whole or in part, by the Coast Guard Court of Criminal Appeals (or its predecessor the Court of Military Review). Chief Judge Baum participated in each case. Judge Bridgman participated in the appeals involving petitioners Lazenby and Leonard. See Pet. 8; Pet. App. 35a-36a, 49a-50a. The decision in each case was issued after the January 15, 1993, secretarial appointments. Pet. Br. 8. The Court of Appeals for the Armed Forces affirmed in each case, relying on its decision on remand in *Ryder*. Pet. Br. 8; see Pet. App. 1a, 34a, 44a, 48a, 60a, 65a.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners challenge the statutory and constitutional authority of the Secretary of Transportation, one of the "Heads of Departments," to appoint judges to the Coast Guard Court of Criminal Appeals. That challenge should be rejected. Military appellate judges are "inferior Officers" within the meaning of the Appointments Clause who may be appointed by a "Head[] of Department[]" if Congress so specifies "by Law." The statutory scheme satisfies the Appointments Clause, because Congress has authorized the Secretary of Transportation to appoint officers within his department and because the Secretary has exercised that power to appoint the civilian judges at issue here.

I. The Constitution requires that principal officers be appointed by the President with the advice and consent of the Senate, but it permits "inferior Officers" to be appointed by, *inter alia*, "Heads of Departments." While the Court has not drawn a bright line between inferior and principal officers, the actions of the First Congress, this Court's Appointments Clause cases, and the functional approach employed in *Morrison* v. *Olson*, 487 U.S. 654 (1988), support the conclusion that judges on the Coast Guard Court of Criminal Appeals are "inferior Officers" within the meaning of the Appointments Clause.

Coast Guard appellate judges lack statutory tenure protections and may be removed from the court at any time by the Judge Advocate General, an individual who is himself subject to supervision and control by the Secretary of Transportation. The Judge Advocate General may not remove a member from the court based on disagreement with the judge's legal rulings. But that limited form of independence is characteristic of administrative adjudicators, and it has never been thought to require characterization as a principal officer. Moreover, judges on the Coast Guard Court of Criminal Appeals are "empowered by the [UCMJ] to perform only certain, limited duties," *Morrison*, 487 U.S. at 671, and their "office is limited in jurisdiction," *id.* at 672. The court's jurisdiction is confined to cases in which Coast Guard members have been convicted of violations of the Uniform Code of Military Justice.

Even in cases falling within its jurisdiction, the Court of Criminal Appeals lacks authority to mandate the outcome that it deems appropriate. The court may not increase the sentence entered by the court-

martial and approved by the convening authority, nor may it order the defendant convicted on charges for which the court-martial entered an acquittal. In addition, every decision of a Court of Criminal Appeals is subject to review by the Court of Appeals for the Armed Forces, which has plenary authority on questions of law.

Petitioners' reliance on *Freytag* v. *Commissioner*, 501 U.S. 868 (1991), is misplaced. The Court in *Freytag* did not determine whether the Chief Judge of the Tax Court is a principal officer, and, even if it had, a similar conclusion would not follow as to military appellate judges. Indeed, the judges at issue here are more closely analogous to the Tax Court's special trial judges, who were held in *Freytag* to be inferior officers.

Finally, Congress did not require that the civilian judges of the Courts of Criminal Appeals be appointed by the President and confirmed by the Senate. The statutory scheme thus reflects an implicit determination that those judges are not principal officers. This Court has *never* invalidated an Act of Congress on the ground that it provided an impermissible means of appointment of a person who was in fact a principal officer.

II. The Secretary of Transportation has broad authority to appoint officers and employees within the department, 49 U.S.C. 323(a), and he is charged with oversight of the Coast Guard at all times when it is not operating as a service in the Navy, 49 U.S.C. 108. The Secretary thus has ample authority to appoint judges to the Coast Guard Court of Criminal Appeals.

Article 66(a) of the UCMJ, which gives the Judge Advocate General power to "assign[]" personnel to military courts of appeals, does not divest the Secre-

tary of the authority he possesses to "appoint" a civilian judge to the Coast Guard Court of Criminal Appeals. The Judge Advocate General of the Coast Guard is the General Counsel of the Department of Transportation, *i.e.*, a subordinate official within the Department. Because the General Counsel could be directed by the Secretary to appoint a particular individual to the Court of Criminal Appeals and because the statutory language does not expressly oust the Secretary's power, Article 66(a) should not be construed to prevent the Secretary from exercising his statutory appointment authority in the case of civilian judges. Moreover, even if this Court were to hold that the Secretary of Transportation lacks statutory authority to "appoint" to the Coast Guard Court of Criminal Appeals an individual who has not previously been "assigned" to that court by the Judge Advocate General, this Court's cases make clear that selection of an "inferior Officer" with the approval of a head of department (which took place, and was authorized by statute, here) is enough to satisfy constitutional requirements.

Recognition of the Secretary's power to appoint judges to the Coast Guard Court of Criminal Appeals, or to approve the assignments of the Judge Advocate General, furthers the purposes of the statutory scheme as a whole. The Uniform Code of Military Justice expressly provides that members of the Courts of Criminal Appeals "may be commissioned officers or civilians." Art. 66(a), UCMJ, 10 U.S.C. 866(a). If Article 66(a) were construed as divesting the Secretary of Transportation of any role in the process of selecting members of the Coast Guard Court of Criminal Appeals, the service's practical ability to utilize civilian judges would be substan-

tially impaired despite Congress's express approval of their use.

ARGUMENT

THE MILITARY APPELLATE APPOINTMENTS AT ISSUE ARE VALID UNDER THE CONSTITUTION AND APPLICABLE STATUTES

The Secretary of Transportation is one of the "Heads of Departments" within the meaning of the Appointments Clause. See 5 U.S.C. 101 (the "Executive departments" include the Department of Transportation); 49 U.S.C. 102(a) and (b) ("The Department of Transportation is an executive department of the United States Government," and "[t]he head of the Department is the Secretary of Transportation."); *Freytag* v. *Commissioner*, 501 U.S. 868, 886 (1991). The Appointments Clause thus permits Congress to vest the Secretary with the power to appoint "inferior Officers." Petitioners contend that the Secretary's appointments of judges to the Coast Guard Court of Criminal Appeals are invalid because (1) those judges are principal officers who must be appointed by the President by and with the advice and consent of the Senate (Pet. Br. 25-33), and (2) even if the judges are inferior officers whose appointment by the Secretary of Transportation would be constitutionally permissible, the Secretary lacked statutory authority to appoint them (Pet. Br. 11-25). Those contentions are incorrect.[7]

[7] We agree with petitioners (see Pet. Br. 8) that the Court need not and should not decide the constitutional question presented in this case unless it concludes that the judges at issue here were appointed in a manner consistent with the relevant statutes. We discuss the constitutional question first, however, because an understanding of the requirements of the Appointments Clause as applied to military appellate judges forms the background for understanding how the statutory scheme should be construed.

I. JUDGES ON THE COAST GUARD COURT OF CRIMINAL APPEALS ARE "INFERIOR OFFICERS" WITHIN THE MEANING OF THE APPOINTMENTS CLAUSE

A. "The Constitution for purposes of appointment * * * divides all its officers into two classes." *United States* v. *Germaine*, 99 U.S. 508, 509 (1879). "Principal officers are selected by the President with the advice and consent of the Senate. Inferior officers Congress may allow to be appointed by the President alone, by the heads of departments," or by the courts. *Buckley* v. *Valeo*, 424 U.S. 1, 132 (1976) (per curiam); *Freytag* v. *Commissioner*, 501 U.S. at 888-892.

While the Framers of the Constitution "provided little guidance" on where to draw the line between "inferior" and "principal" officers, *Morrison* v. *Olson*, 487 U.S. 654, 671 (1988), the actions of the First Congress in establishing the original executive departments make clear that the category of "inferior officers" is not limited to persons performing petty or insignificant duties.[8] The statutes establishing two of the three departments created during 1789 provided for the appointment of a single "principal officer"—the Secretary—and expressly authorized the Secretary to appoint an "inferior officer" who would serve

[8] As this Court has recognized, statutes "passed by the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument, * * * [are] contemporaneous and weighty evidence of its true meaning." *Wisconsin* v. *Pelican Ins. Co.*, 127 U.S. 265, 297 (1888); see *Marsh* v. *Chambers*, 463 U.S. 783, 790 (1983).

as his second-in-command.[9] Thus, the Act creating the Department of Foreign Affairs stated:

> *Be it enacted,* * * * That there shall be an Executive department, to be denominated the Department of Foreign Affairs, and that there shall be a principal officer therein, to be called the Secretary for the Department of Foreign Affairs * * *.
>
> Sec. 2. *And be it further enacted,* That there shall be in the said department an inferior officer, to be appointed by the said principal officer, and to be employed therein as he shall deem proper, and to be called the chief Clerk in the Department for Foreign Affairs, and who, whenever the said principal officer shall be removed from office by the President of the United States, or in any other case of vacancy, shall during such vacancy have the charge and custody of all records, books and papers appertaining to the said department.

Act of July 27, 1789, Sess. I, ch. 4, 1 Stat. 28-29. The statute creating the Department of War likewise

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[9] As Representative White stated:

> Who are the heads of departments? We are to have a Secretary for Foreign Affairs, another for War, and another for the Treasury; now, are not these the principal officers in those departments? They are denominated such in the bills, and in the former resolution of the House; if they are, they are the heads of those departments. But who are the inferior officers? The chief clerks, and all others who may depend upon them. These, then, are the inferior officers, whose appointments may be vested in the respective heads of departments.

1 The Debates and Proceedings in the Congress of the United States 538 (1834) (proceedings of June 18, 1789).

provided for the appointment of a single "principal officer" (the "Secretary for the Department of War") and an "inferior officer" (known as the "chief clerk"), who would be employed as the Secretary "shall deem proper," and who would "have the charge and custody of all records, books and papers" during any vacancy in the office of the Secretary. 1 Stat. 49-50.[10]

This Court's few decisions to address the issue have held a variety of subordinate officials to be inferior rather than principal officers under the Appointments Clause. See *United States* v. *Eaton*, 169 U.S. 331, 343 (1898) (vice-consuls); *Ex parte Siebold*, 100 U.S. 371, 397-398 (1879) (supervisors of elections); see generally *Morrison*, 487 U.S. at 672-673. Subordinate judicial officers were among those found to be inferior officers. See *Go-Bart Importing Co.* v. *United States*, 282 U.S. 344, 352-353 (1931) (United States commissioners); *Reagan* v. *United States*, 182 U.S. 419, 424 (1901) (same); *Rice* v. *Ames*, 180 U.S. 371, 378 (1901) (same). Although these decisions do not elaborate on the issue, they suggest that an officer who is subject to removal and supervision by an officer other than the President is generally an "inferior Officer."

This Court's decision in *Morrison* v. *Olson*, *supra*, is consistent with that view. In *Morrison*, this Court held that an Independent Counsel is an "inferior officer" whose appointment may constitutionally be vested in the "Courts of Law." 487 U.S. at 671-677.

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[10] The statute creating the Department of Treasury provided that the department would contain "[a] Secretary of the Treasury, to be deemed head of the department, a Comptroller, an Auditor, a Treasurer, a Register, and an Assistant to the Secretary of the Treasury, which assistant shall be appointed by the said Secretary." 1 Stat. 65-66.

The Court declined "to decide exactly where the line falls between" principal and inferior officers, because it held that the Independent Counsel "clearly falls on the 'inferior officer' side of that line." *Id.* at 671. Although acknowledging that the Independent Counsel "possesses a degree of independent discretion to exercise the powers delegated to her" by statute, the Court found it significant that an Independent Counsel "is subject to removal by a higher Executive Branch official," *ibid.*; "is empowered * * * to perform only certain, limited duties," *ibid.*; and occupies an office that "is limited in jurisdiction," *id.* at 672.

In *Weiss* v. *United States*, 510 U.S. 163 (1994), this Court rejected an Appointments Clause challenge to the assignment of commissioned officers to serve as military judges. The Court did not specifically address the question whether miliary appellate judges are inferior officers. Its conclusion that the role of military judge is "germane" to the position of military officer, *id.* at 174-175, however, implies that both are "inferior officers." It is unlikely that all commissioned officers are "principal officers," and it would be anomalous to describe the duties of a principal officer as "germane" to those of an inferior officer. In his concurring opinion in *Weiss*, Justice Souter expressly addressed the issue. He concluded that military judges, including military appellate judges, are inferior officers. *Id.* at 192-194 (Souter, J., concurring).[11]

[11] Justice Souter asked whether military judges are principal or inferior officers because of his view that, if military judges are principal officers, the current method by which they are selected—*i.e.*, assignment to a court by the Judge Advocate General without a new appointment by the President and confirmation by the Senate—would violate the Appointments Clause. 510 U.S. at 189-191. If Justice Souter is correct that military judges would be improperly appointed if they are principal officers, a holding by this Court that the members of the Coast Guard Court of Criminal Appeals are principal officers would open to question the constitutional validity of the appointments of *all* members of the Military Courts of Criminal Appeals.

Justice Souter's conclusion is correct. Consideration of the criteria discussed in *Morrison* in light of the specific function of military appellate judges makes clear that judges of the Coast Guard Court of Criminal Appeals are inferior rather than principal officers.

1. *Removal.* Like the Independent Counsel, judges on the Coast Guard Court of Criminal Appeals are "subject to removal by a higher Executive Branch official." *Morrison*, 487 U.S. at 671. Article 66(a) of the UCMJ, 10 U.S.C. 866(a), authorizes the Judge Advocate General (the General Counsel of the Department of Transportation) to "establish a Court of Criminal Appeals," but imposes no requirement regarding the amount of time that an individual judge must be permitted to serve before giving way to his successor. As the Court of Appeals for the Armed Forces has recognized, judges on the Courts of Criminal Appeals "do not enjoy tenure and thus may be reassigned to other duties." *United States* v. *Ryder*, 44 M.J. 9, 11 (C.A.A.F. 1996). See also *Weiss* v. *United States*, 510 U.S. at 178 ("Although a fixed term of office is a traditional component of the Anglo-American civilian judicial system, it has never been a part of the military justice tradition."); *id.* at 193 (Souter, J., concurring) (noting that "Court of

[Criminal Appeals] judges have no fixed term of office"); *United States* v. *Graf*, 35 M.J. 450, 460 (C.M.A. 1992) ("Congress has not provided for a fixed term of office for military trial and appellate judges."), cert. denied, 510 U.S. 1085 (1994). Cf. Rules for Courts-Martial 109(a) ("Each Judge Advocate General is responsible for the professional supervision and discipline of military trial and appellate military judges.").

The judges may therefore be removed from the court by an Executive Branch official, who is himself subordinate to the Secretary of Transportation. A position from which one may be removed by a subordinate official in a department is not naturally characterized as a principal office. Petitioners, while pointing out that the Coast Guard's past practice has been to permit civilian judges to serve on the Court of Criminal Appeals for substantial periods (see Pet. Br. 28), appear to concede that judges on that court have no statutory tenure. Indeed, those judges are more susceptible to removal from their positions on the court than is an Independent Counsel, who can be removed by the Attorney General only for cause, 28 U.S.C. 596(a)(2), and who may obtain judicial review of any removal decision, 28 U.S.C. 596(a)(3).

As this Court recognized in *Weiss*, the Judge Advocate General's authority to remove military judges from their courts is not entirely unconstrained. See 510 U.S. at 181. The Court of Military Appeals in *Graf*, while making clear that military trial and appellate judges lack tenure, see 35 M.J. at 460, held that the "exercise of the power to decertify or transfer a military judge based on [the Judge Advocate General's] opinions of the appropriateness of his findings and sentences * * * violates Articles 26

and 37 of the UCMJ," *id.* at 465. Judges on the Court of Criminal Appeals are therefore "independent" (*id.* at 464) in the limited sense that they cannot be deprived of their positions based on the Judge Advocate General's disagreement with their legal rulings.

That limited form of independence is characteristic, however, of many federal adjudicative officials who have never been thought to be principal officers. It is, in particular, characteristic of administrative law judges (ALJs). As this Court has recognized, "the role of the modern federal hearing examiner or administrative law judge * * * is 'functionally comparable' to that of a judge." *Butz* v. *Economou*, 438 U.S. 478, 513 (1978). "[T]he process of agency adjudication is currently structured so as to assure that the hearing examiner exercises his independent judgment on the evidence before him, free from pressures by the parties or other officials within the agency." *Ibid.*; see *id.* at 514 (discussing statutory provisions designed to guarantee independence of agency adjudicators); *Nash* v. *Califano*, 613 F.2d 10, 16 (2d Cir. 1980) ("The APA creates a comprehensive bulwark to protect ALJs from agency interference."). ALJs are appointed by the agencies in which they work, however, see 5 U.S.C. 3105, and they have not been thought to be principal officers. Cf. *Pennsylvania* v. *United States Dep't of Health and Human Servs.*, 80 F.3d 796, 801-806 (3d Cir. 1996) (holding that members of HHS Departmental Appeals Board are inferior officers despite Board members' performance of adjudicative functions, and despite parties' stipulation (*id.* at 802) that "Board members will serve indefinitely unless removed for misconduct"); 28 U.S.C. 631(a) and (i) (federal magistrate judges are appointed by the district courts and may be

removed by them "only for incompetency, misconduct, neglect of duty, or physical or mental disability").

2. *Duties and jurisdiction.* Judges on the Coast Guard Court of Criminal Appeals are "empowered by the [UCMJ] to perform only certain, limited duties," *Morrison*, 487 U.S. at 671, and their "office is limited in jurisdiction," *id.* at 672. As the Court of Appeals for the Armed Forces has observed, "the jurisdiction of judges of the Court of Criminal Appeals is limited to violations of the Uniform Code of Military Justice and the Law of War by persons subject to military jurisdiction," *Ryder*, 44 M.J. at 10-11, which, in the case of the Coast Guard Court of Criminal Appeals, limits its jurisdiction to Coast Guard members.

Even with respect to the cases falling within its jurisdiction, the Court of Criminal Appeals does not have plenary authority to mandate the outcome that it deems appropriate. "In a case referred to it, the Court of Criminal Appeals may act only with respect to the findings and sentence as approved by the convening authority." Art. 66(c), UCMJ, 10 U.S.C. 866(c). The court may affirm or reverse, in whole or in part, any conviction or sentence entered by the court-martial and approved by the convening authority; but it may not increase the sentence or order the defendant convicted on charges for which the court-martial entered an acquittal. The effect of the statutory scheme is, generally speaking, that a conviction or sentence can stand only if the court-martial, the convening authority, and the Court of Criminal Appeals *all* deem it to be appropriate.[12] The fact that

[12] The only exception to that rule is that a Court of Criminal Appeals decision reversing a conviction or mitigating a sentence is reviewable for legal error in the Court of Appeals for the Armed Forces. See Art. 67, UCMJ, 10 U.S.C. 867. In that respect the Court of Criminal Appeals has *less* authority to determine the ultimate disposition of the case than does the court-martial or the convening authority.

the Court of Criminal Appeals enters the process after the court-martial and the convening officer have rendered their decisions does not mean that the Court of Criminal Appeals has a greater practical impact upon the disposition of the case than do the other officials involved.

The decision of a Court of Criminal Appeals is subject, moreover, to further review by the Court of Appeals for the Armed Forces. See Art. 67(a), UCMJ, 10 U.S.C. 867(a).[13] Although the Court of Appeals for the Armed Forces reviews only a small percentage of the cases decided by the Courts of Criminal Appeals (see Pet. Br. 30), that fact is largely irrelevant to the Appointments Clause analysis. The Court of Appeals for the Armed Forces possesses the *authority* to review any decision issued by a Court of Criminal Appeals in which either the government or the defendant requests review. See Art. 67(a), UCMJ, 10 U.S.C. 867(a).[14] The fact that the court exercises that authority in only a small percentage of the cases falling within its jurisdiction does not affect the

[13] In contrast to the Court of Criminal Appeals, judges of the Court of Appeals for the Armed Forces are appointed by the President, by and with the advice and consent of the Senate, for a fixed term of approximately 15 years. See Art. 142(b)(1) and (2), UCMJ, 10 U.S.C. 942(b)(1) and (2).

[14] The court is required, moreover, to review "all cases reviewed by a Court of Criminal Appeals which the Judge Advocate General orders sent to the Court of Appeals for the Armed Forces for review." Art. 67(a)(2), UCMJ, 10 U.S.C. 867(a)(2).

subordinacy of the Court of Criminal Appeals within the military justice hierarchy. Indeed, the Court of Appeals for the Armed Forces has emphasized that, "[i]n the absence of a superceding statute or an intervening decision of [the Court of Appeals for the Armed Forces] or the Supreme Court of the United States," its decisions are "absolutely binding on the Court[s] of Criminal Appeals." *United States* v. *Allbery*, 44 M.J. 226, 228 (C.A.A.F. 1996).

Under the UCMJ, the Court of Appeals for the Armed Forces is authorized to "take action only with respect to matters of law." Art. 67(c), UCMJ, 10 U.S.C. 867(c). The scope of review thus exercised "is narrower than the review exercised by the Court of [Criminal Appeals]," *Ryder* v. *United States*, 115 S. Ct. 2031, 2038 (1995), which extends to questions of fact, see Art. 66(c), UCMJ, 10 U.S.C. 866(c). That disparity is insufficient, however, to justify the conclusion that judges on the Coast Guard Court of Criminal Appeals are principal officers. By permitting review for legal error of any Court of Criminal Appeals decision, Article 67 ensures that the Court of Appeals for the Armed Forces is the authoritative body for announcing rules of law in the military justice system. The assignment to subordinate courts of a greater role in determining the facts does not transform those courts into superior authorities.

Indeed, a variety of federal adjudicative officers appointed by heads of departments or by the courts are authorized by statute to issue final decisions that are reviewable under a deferential standard. Thus, decisions of the HHS Departmental Appeals Board, whose members are appointed by the Secretary, see *Pennsylvania*, 80 F.3d at 800, are reviewed under the APA standards governing challenges to agency action. See, *e.g.*, 42 U.S.C. 608(k)(2). ALJ decisions in Longshore Act cases are reviewed by the Benefits Review Board, but the ALJ's findings of fact are "conclusive if supported by substantial evidence in the record considered as a whole." 33 U.S.C. 921(b)(3). Special masters in Vaccine Act cases are appointed by the United States Court of Federal Claims, see 42 U.S.C. 300aa-12(c)(1), and their decisions are likewise reviewable under APA standards, see 42 U.S.C. 300aa-12(e)(2)(B). Members of the Board of Veterans' Appeals are (with the exception of the Chairman) appointed by the Secretary of Veterans' Affairs "with the approval of the President," 38 U.S.C. 7101A(a), and their decisions are reviewed deferentially by the Court of Veterans Appeals, see 38 U.S.C. 7261. Federal magistrate judges are appointed by the district courts, 28 U.S.C. 631(a); they are authorized, with the consent of the parties, to conduct civil trials, see 28 U.S.C. 636(c)(1), and appeals from their judgments in such cases may be taken "in the same manner as an appeal from any other judgment of a district court," see 28 U.S.C. 636(c)(3). Despite the deference paid to the decisions of these judicial actors, none of them is regarded as a principal officer.[15]

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[15] We recognize that the division of functions between the military appellate courts and the Court of Appeals for the Armed Forces resembles in some respects the manner in which decisions of the regional courts of appeals are reviewed by this Court. Judges who serve on Article III courts, however, enjoy life tenure and protection against diminution of salary—characteristics that by themselves may qualify such judges as principal officers. History also provides substantial support for placing Article III judges in the ranks of principal officers. See *Weiss*, 510 U.S. at 191 & n.7 (Souter, J., concurring). No comparable pedigree exists for military appellate judges.

Thus, judges on the Coast Guard Court of Criminal Appeals are "inferior" to two distinct sets of governmental officers. They are subject to removal from the court at any time by the Judge Advocate General, who is in turn subordinate to the Secretary of Transportation. Their legal rulings are subject to review by the Court of Appeals for the Armed Forces, whose precedents the Courts of Criminal Appeals are obliged to follow. Insofar as they are subject to two distinct sets of superior officers, judges on the Coast Guard Court of Criminal Appeals occupy a position similar to that of many other federal adjudicative officials. See page 27, *supra*. The fact that no single official acts as their superior with respect to all aspects of their work does not alter the judges' status as inferior officers.

C. In *Freytag*, this Court upheld, against an Appointments Clause challenge, a statutory provision authorizing the Chief Judge of the Tax Court to appoint special trial judges, whom the Court found to be inferior officers. Petitioners argue that (1) the Court in *Freytag* implicitly held that the Chief Judge was a principal officer (Pet. Br. 31-32) and (2) "if judges of the Tax Court are principal officers, then the civilian and military judges of the Courts of Criminal Appeals must be in the same category" (*id.* at 32). Neither claim has merit.

Although four concurring Justices in *Freytag* concluded (consistent with the government's argument) that the Chief Judge of the Tax Court was the head of a department (see 501 U.S. at 914-922 (Scalia, J., concurring in part and concurring in the judgment)), the Court did not so hold. Rather, the Court held that the Chief Judge was authorized to appoint inferior officers on the ground that the Tax Court is one of

the "Courts of Law" within the meaning of the Appointments Clause. See *id.* at 888-892. The Court did not decide whether the "Courts of Law" to whom the appointment power is given are composed exclusively of principal officers. Cf. *Weiss*, 510 U.S. at 192-193 (Souter, J., concurring) (while Tax Court is a "Court[] of Law" under the Appointments Clause, "it may be that the Appointments Clause envisions appointment of some inferior officers by other inferior officers").

In any event, the Tax Court is not located within any executive department, and judges on that Court are provided with statutory tenure protections. See 26 U.S.C. 7443(e) ("The term of office of any judge of the Tax Court shall expire 15 years after he takes office."), 26 U.S.C. 7443(f) ("Judges of the Tax Court may be removed by the President, after notice and opportunity for public hearing, for inefficiency, neglect of duty, or malfeasance in office, but for no other cause."); *Freytag*, 501 U.S. at 915 (Scalia, J., concurring in part and concurring in the judgment) ("the Tax Court is a free-standing, self-contained entity in the Executive Branch, whose Chief Judge is removable by the President (and, save impeachment, no one else)"). The Coast Guard Court of Criminal Appeals, by contrast, is located within the Department of Transportation, and judges are removeable from that court by the Department's General Counsel. Thus, even if the Chief Judge of the Tax Court is assumed to be a principal officer, it does not follow that judges on the Coast Guard Court of Criminal Appeals possess the same status.

Indeed, the decision in *Freytag* undermines rather than supports petitioners' argument. The Court in *Freytag* held that the Tax Court's special trial judges

are inferior officers rather than employees. See 501 U.S. at 881-882.[16] The Court based that conclusion on the fact that "[u]nder [26 U.S.C.] §§ 7443A(b)(1), (2), and (3), and (c), the Chief Judge may assign special trial judges to render the decisions of the Tax Court in declaratory judgment proceedings and limited-amount tax cases." *Id.* at 882. The Court observed that in those categories of cases, "special trial judges act as inferior officers who exercise independent authority." *Ibid.*[17] The Court evidently concluded that neither the performance of adjudicative functions nor the exercise of some degree of "independent authority" was a sufficient basis for holding that the special trial judges are principal officers. The judges on the Coast Guard Court of Criminal Appeals, who lack statutory tenure protections, are more closely

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[16] Petitioners in *Freytag* contended that it was "arguable that a special trial judge is a 'principal' rather than an 'inferior' officer." 90-762 Pet. Br. at 28 n.26. They observed that "[i]f a special trial judge is a principal rather than an inferior officer, reversal of the judgment below is mandated, because all principal officers must be appointed by the President with the advice and consent of the Senate." *Ibid.* Although this Court did not explicitly address the contention that the special trial judges are principal officers, it stated without qualification that those judges are inferior officers, see 501 U.S. at 881, 882, and it affirmed the judgment of the court of appeals, *id.* at 892.

[17] Although decisions of the Tax Court (including decisions of special trial judges who have been assigned to render the decision of the Tax Court) may be reviewed in the courts of appeal, they are reviewable "in the same manner and to the same extent as decisions of the district court in civil actions tried without a jury," 26 U.S.C. 7482(a)(1)—*i.e.*, their factual findings may be reversed only if clearly erroneous.

analogous to special trial judges than to the Chief Judge of the Tax Court.

D. Congress did not require that judges of the Courts of Criminal Appeals be appointed by the President and confirmed by the Senate. See Section II, *infra*. The statutory scheme thus reflects an implicit determination that those judges are not principal officers. That judgment should not lightly be overturned. See *Weiss*, 510 U.S. at 194 (Souter, J., concurring) ("Since the chosen method for selecting military judges shows that neither Congress nor the President thought military judges were principal officers, and since in the presence of doubt deference to the political branches' judgment is appropriate, I conclude that military judges are inferior officers for purposes of the Appointments Clause."). Indeed, this Court has *never* invalidated an Act of Congress on the ground that it provided an impermissible means of appointment of a person who was in fact a principal officer.

II. THE JUDGES WHO RULED IN PETITIONERS' CASES WERE APPOINTED IN A MANNER CONSISTENT WITH THE RELEVANT STATUTES

Article 66(a) of the UCMJ, 10 U.S.C. 866(a), provides that "[e]ach Judge Advocate General shall establish a Court of Criminal Appeals" and "shall designate as chief judge one of the appellate military judges of the Court of Criminal Appeals established by him." Article 66(a) also states that "[a]ppellate military judges who are assigned to a Court of Criminal Appeals may be commissioned officers or civilians." "Although Article 66 does not specifically state that the Judge Advocate General of the respective service will designate the members of the

Military Courts of [Criminal Appeals], * * * [t]hat is how the statute has been interpreted since its passage." *United States* v. *Prive*, 35 M.J. 569, 571 (C.G.C.M.R. 1992). See also *Weiss*, 510 U.S. at 169 (judges of the Courts of Criminal Appeals "are selected and assigned to serve by the appropriate Judge Advocate General") (citing Art. 66, UCMJ, 10 U.S.C. 866). In entrusting the authority to select military appellate judges to the Judge Advocates General, Congress presumably determined that the placement of a judge on a Court of Criminal Appeals does not involve an "appointment" subject to the requirements of the Appointments Clause. That inference is supported by the language of Article 66(a), which does not use the word "appointment" or "appoint," but instead refers to judges "assigned" to a Court of Criminal Appeals.

It is correct that commissioned military officers are not "appointed" within the meaning of the Constitution when they are placed on a Court of Criminal Appeals. A military officer has already received one appointment within the meaning of the Appointments Clause. As this Court held in *Weiss*, the Appointments Clause "does not require a second appointment before military officers may discharge the duties of" military judges. 510 U.S. at 176. The Constitution does not, however, permit the Judge Advocate General to assign to a military court a civilian judge who does not have an appointment conforming to the requirements of the Appointments Clause.

Petitioners contend that Article 66(a) constitutes "the exclusive means by which individuals may become members of military appellate tribunals." Pet. Br. 24. That argument, if accepted, would substantially impair the Coast Guard's ability to utilize

civilian judges on its Court of Criminal Appeals—a practice specifically authorized by Article 66(a) itself. The Judge Advocate General is not a "Head of Department." Though he may assign to military judgeships persons who have received constitutionally valid appointments to related offices, he lacks constitutional authority to appoint inferior officers. The practical consequence of petitioners' theory therefore is that civilian judges could become members of the Court of Criminal Appeals only by being first appointed to some other inferior office by the Secretary of Transportation (or by another official specified in the Appointments Clause) and then being assigned to the court by the Judge Advocate General. In our view, the relevant statutory provisions are far better harmonized by recognizing that the Secretary does have power to appoint civilian judges to the Court of Criminal Appeals. That approach facilitates the use of civilian judges in accordance with congressional intent, while avoiding the constitutional infirmity inherent in the appointment of inferior officers by the Judge Advocate General.

A. The appointments at issue here fall within the literal terms of the Secretary's statutory authority. The Secretary of Transportation is empowered to "appoint and fix the pay of officers and employees of the Department of Transportation and [to] prescribe their duties and powers." 49 U.S.C. 323(a).[18] In addi-

[18] The Secretary has possessed that appointment authority since the creation of the Department of Transportation. See Department of Transportation Act, Pub. L. No. 89-670, § 9(a), 80 Stat. 944 (1966). As petitioners point out (Pet. Br. 22), the provision as originally enacted authorized the Secretary to appoint "such officers and employees as are necessary to carry out the provisions of this Act." 80 Stat. 944. Section 6(b)(1) of

tion to the general grant of authority over the Department as a whole, he is charged with oversight of the Coast Guard at all times when it is not operating as a service in the Navy. The Commandant of the Coast Guard is directed to "carry out duties and powers prescribed by the Secretary of Transportation," and he "reports directly to the Secretary." 49 U.S.C. 108(b). The Secretary may "promulgate such regulations and orders as he deems appropriate to carry out the provisions of [Title 14] or any other law applicable to the Coast Guard," 14 U.S.C. 633, and "[f]or the purpose of executing the duties and functions of the Coast Guard the Secretary may * * * do any and all things necessary to carry out the purposes of [Title 14]," 14 U.S.C. 92(i). See also *United States* v. *Washington*, 43 M.J. 840, 844 (C.G.C.C.A. 1996) (noting "the statutory position of the Secretary as the highest military justice official for the Coast Guard"). Those provisions give the Secretary of Transportation ample statutory authority to appoint judges to the Coast Guard Court of Criminal Appeals.[19]

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the 1966 Act, however, transferred the Coast Guard to the Department of Transportation and "vested in the Secretary all functions, powers, and duties, relating to the Coast Guard" that had previously been vested in the Department of the Treasury. 80 Stat. 938. Judges on the Coast Guard Court of Criminal Appeals are therefore naturally characterized as officers who are "necessary to carry out the provisions of [the Department of Transportation] Act."

[19] Petitioners argue that "if Congress provides for the appointment of an inferior officer, but assigns the power to a person not listed in the Appointments Clause, that provision has no effect, and the residual appointment power of the President, with the advice and consent of the Senate, applies." Pet. Br. 11 (citing *Appointment of Assistant Assessors of*

Petitioners contend that "a catch-all appointment provision such as this does not constitute a considered judgment that any officer, let alone one as significant as a military appellate judge, should not be appointed by the usual means provided in the Constitution [*i.e.*, appointment by the President with the advice and consent of the Senate]." Pet. Br. 13; see also *id.* at 24 ("the Government's argument trivializes the office of appellate military judge by suggesting that Congress intended that civilian military judges be appointed pursuant to a catch-all provision"). Section 323(a)'s reference to "officers and employees," however, refutes petitioners' suggestion (Pet. Br. 14) that the provision should be construed to apply to "employees" alone. Cf. *United States* v. *Germaine*, 99 U.S. 508, 510 (1879) (statute prohibiting extortion by any "officer of the United States" applies only to "officers" appointed in conformity with the Appointments Clause).

There is also no requirement that Congress speak with "specificity" (Pet. Br. 14), or that it direct its attention to Section 323(a)'s potential application to a particular office (Pet. Br. 17). The Framers' "concern about excessive diffusion of power and hence accountability" (*id.* at 13) requires that the department head (or other official specified in the Appointments Clause) must accept responsibility for the appointment of an inferior officer; it does not require

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Internal Revenue, 11 Op. Att'y Gen. 209 (1865)). Petitioners' reliance on the 1865 Attorney General opinion is misplaced. That opinion makes clear that a statute authorizing a department head to appoint an inferior officer may validly be applied in the event that a different statute authorizing appointment by a subordinate is determined to be invalid. 11 Op. Att'y Gen. at 212.

that Congress must specify by name each office for which appointment authority is granted. See *Pennsylvania*, 80 F.3d at 804 (holding that 42 U.S.C. 913, which authorizes the Secretary of HHS "to appoint and fix the compensation of such officers and employees * * * as may be necessary," furnishes a sufficient statutory basis for the Secretary's appointment of Departmental Appeals Board members). So long as the pertinent statutory provisions apply by their terms to the appointments at issue here—and it is clear that they do—it is irrelevant whether Congress specifically contemplated the prospect that they would be invoked as a basis for appointment of military judges.[20]

B. Petitioners' principal statutory argument is that Section 323(a) "does not apply if the appointment of an officer is otherwise provided for by law." Pet. Br. 18. Relying on the "rule of statutory interpretation" that the specific controls the general (*id* at 14), petitioners contend that Article 66(a) of the UCMJ, 10 U.S.C. 866(a), which is addressed specifically to the establishment of Courts of Criminal Appeals, takes precedence over the general grant of appointment authority contained in Section 323(a). Pet. Br. 14. The statutory text does not support the contention

[20] Petitioners suggest (Pet. Br. 17) that it would be incongruous to conclude that appointment authority in addition to Article 66(a) exists only for Coast Guard appellate judges, and not for other branches of the military service. Yet no other branch of the Armed Forces currently uses civilian judges, see Pet. Br. 5 n.2 (noting that the Navy has done so in the past). That practice is consistent with the fact that Article 66(a)'s provision for civilian appointments originated as a response to the Coast Guard's special need for flexibility because of its small number of lawyers. See note 4, *supra*.

that the Judge Advocate General's authority under Article 66(a) to "assign[]" civilians to the Coast Guard Court of Criminal Appeals supersedes the Secretary's power to "appoint * * * officers * * * of the Department of Transportation" under Section 323(a), and the claim lacks merit as a matter of logic.

If Article 66(a) conferred appointment authority on an official outside the Secretary's control, Section 323(a) would indeed be inapplicable. Thus, as petitioners point out (Pet. Br. 17-18), Congress has required that certain officials within the Department of Transportation must be appointed by the President with the advice and consent of the Senate.[21] Other departmental officials are appointed by the Secretary "with the approval of the President."[22] With respect to those offices, we agree that the Secretary of Transportation could not circumvent the express statutory limitations on his appointment power by invoking Section 323(a) as a source of appointment authority.

In light of the subordinate position of the Judge Advocate General within the Department of Transportation, however, Article 66(a) cannot realistically

[21] See, *e.g.*, 49 U.S.C. 102(c), (d), and (e) (Deputy Secretary of Transportation, Associate Deputy Secretary of Transportation, Assistant Secretaries of Transportation, and General Counsel); 49 U.S.C. 103(b) (Federal Railroad Administrator); 49 U.S.C. 104(b)(1) (Federal Highway Administrator); 49 U.S.C. 105(b) (National Highway Traffic Safety Administrator); 49 U.S.C. 106(b) (Federal Aviation Administrator).

[22] See, *e.g.*, 49 U.S.C. 102(e) (Assistant Secretary of Transportation for Administration); 49 U.S.C. 104(b)(2) and (3) (Deputy Federal Highway Administrator and Assistant Federal Highway Administrator); 49 U.S.C. 105(b) (Deputy National Highway Traffic Safety Administrator).

be viewed as a limitation on the Secretary's appointment power. The Judge Advocate General of the Coast Guard is the General Counsel of the Department of Transportation. Art. 1(1), UCMJ, 10 U.S.C. 801(1). The General Counsel is directed by statute to "carry out duties and powers prescribed by the Secretary," 49 U.S.C. 102(e), and could be directed by the Secretary to appoint a particular individual to the Court of Criminal Appeals. To read Article 66(a) as divesting the Secretary of his power to appoint military judges within the Department in that setting would make no sense. Such a construction would only be plausible if the appointing power were given to an official outside the Secretary's control. The Judge Advocate General is not such a person.

Contrary to petitioners' contention (Pet. Br. 18), our argument does not imply that the Secretary could alter the "duties and powers" of judges on the Coast Guard Court of Criminal Appeals. Section 323(a) does not permit the imposition of duties that would conflict with Article 66's specific provisions on how the court may conduct its review. See Art. 66(c), UCMJ, 10 U.S.C. 866(c). The Secretary could not, for example, direct the court to limit its scrutiny of court-martial decisions to review for legal error. The Secretary retains his Section 323(a) authority, however, absent an actual conflict between that statute and some more specific provision. In light of the General Counsel's position as the Secretary's subordinate and the language of the two provisions, no conflict exists between Article 66(a) and Section 323(a).

C. In his memorandum of January 15, 1993, the Secretary of Transportation did not purport to change the composition of the Court of Criminal Appeals or to override the Judge Advocate General's prior de-

cisions regarding its membership. Rather, the Secretary announced that "[t]he assignment of appellate military judges to the Coast Guard Court of Military Review, as reflected in the General Counsel's memo of April 20, 1992, is adopted this date as judicial appointments of my own." Pet. Br. App. A6.

This Court has held that appointment of an inferior officer by a subordinate departmental official, with the express approval of the department head, is sufficient to satisfy the Appointments Clause. In *United States* v. *Hartwell*, 73 U.S. (6 Wall.) 385 (1867), the Court held that a clerk in the Department of the Treasury was properly indicted under a federal statute prohibiting misuse of public monies by any "officer of the United States." The Court explained that the defendant

> was a public officer. The General Appropriation Act of July 23d, 1866, authorized the assistant treasurer, at Boston, with the approbation of the Secretary of the Treasury, to appoint a specified number of clerks * * *. The indictment avers the appointment of the defendant in the manner provided in the act.

Id. at 393 (footnote omitted).[23] The Court concluded on that basis that "[t]he defendant was appointed by the head of a department within the meaning of the

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[23] The indictment in the case alleged that the defendant was "a clerk in the office of the assistant treasurer of the United States, at Boston, appointed by the assistant treasurer, with the approbation of the Secretary of the Treasury." 73 U.S. (6 Wall.) at 388 (emphasis omitted).

constitutional provision upon the subject of the appointing power." *Id.* at 393-394.[24]

Even if this Court were to determine that the Secretary of Transportation lacks statutory authority to appoint to the Coast Guard Court of Criminal Appeals an individual who has not been assigned to that court by the Judge Advocate General, the Secretary surely has authority to approve the Judge Advocate General's selection.[25] As noted above, the Secretary is authorized not only to appoint departmental officers and employees pursuant to Section 323(a), but also to "promulgate such regulations and orders as he deems appropriate to carry out the provisions of [Title 14] or any other law applicable to the Coast Guard." 14 U.S.C. 633. "For the purpose of executing the duties and functions of the Coast Guard

[24] In its subsequent decision in *Germaine*, the Court held that a surgeon appointed by the Commissioner of Pensions was not subject to prosecution under a federal statute prohibiting extortion by an "officer of the United States." Because the Commissioner was not a "head of department" within the meaning of the Appointments Clause, the Court explained, the defendant could not properly be regarded as an "officer of the United States." 99 U.S. at 509-511. The Court distinguished *Hartwell* by noting that "[i]t is clearly stated and relied on in the opinion that Hartwell's appointment was approved by the Assistant Secretary of the Treasury as acting head of that department, and he was, therefore, an officer of the United States." 99 U.S. at 511.

[25] The Secretary's January 15, 1993, memorandum expresses an intent not simply to approve the Judge Advocate General's prior assignments of judges to the Court of Criminal Appeals, but to "adopt[]" those assignments as appointments of the Secretary. If this Court concludes, however, that the Secretary's statutory authority is limited to the approval (as in *Hartwell*) of the General Counsel's selections, the January 15, 1993, memorandum reflects such approval.

the Secretary may * * * do any and all things necessary to carry out the purposes of [Title 14]." 14 U.S.C. 92(i). The Secretary's January 15, 1993, memorandum "adopt[ing]" (Pet. Br. App. A6) the Judge Advocate General's earlier assignments was authorized by those statutory provisions as well as by Section 323(a) and was sufficient, under *Hartwell*, to satisfy the requirements of the Appointments Clause.[26]

D. Recognition of the Secretary's power to appoint judges to the Coast Guard Court of Criminal Appeals, or to approve the assignments of the Judge Advocate General, furthers the purposes of the statutory scheme as a whole. In enacting Article 66(a), with the Coast Guard especially in mind, Congress expressly authorized the services to utilize civilian judges on the Courts of Criminal Appeals so that a wider pool of potential judges would possess the statutory qualifications. See note 4, *supra*. If Article 66(a) is construed as conferring upon the Judge Advocate

[26] Petitioners argue that it would be an "anomaly" (Pet. Br. 15) if the General Counsel of the Department of Transportation appointed some members of the Coast Guard Court of Military Appeals, while the Secretary of Transportation (his superior) appointed others. In actuality, the constitutional source of each member's "appointment" is not the Judge Advocate General. For commissioned officers, the appointing authority is the President, with the advice and consent of the Senate (see 14 U.S.C. 211(a)), while for civilians, it is the Secretary (see 49 U.S.C. 323(a)). We see nothing anomalous about the fact that civilian judges, who have not received commissions as military officers, must receive their appointments in a different manner. But in any event, it is clear that no anomaly exists with respect to the civilian judges at issue here, who were chosen for service by both the Secretary and the Judge Advocate General.

General exclusive authority to select members of the Coast Guard Court of Criminal Appeals, however, the Coast Guard's practical ability to utilize civilian judges will be substantially impaired. At the same time, that construction would serve no useful purpose. As noted above, the General Counsel is a subordinate official within the Department of Transportation, who could be directed by the Secretary to appoint particular individuals to the Coast Guard Court of Criminal Appeals. To permit the Secretary to exercise a more direct role in the appointment process does not deprive the Judge Advocate General of any practical authority that he would otherwise possess.

CONCLUSION

The judgments of the Court of Appeals for the Armed Forces should be affirmed.

Respectfully submitted.

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APPENDIX

The Appointments Clause, U.S. Const. Art. II, § 2, Cl. 2, provides that the President

> shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Article 66 of the Uniform Code of Military Justice, 10 U.S.C. 866, provides:

(a) Each Judge Advocate General shall establish a Court of Criminal Appeals which shall be composed of one or more panels, and each such panel shall be composed of not less than three appellate military judges. For the purpose of reviewing court-martial cases, the court may sit in panels or as a whole in accordance with rules prescribed in subsection (f). Any decision of a panel may be reconsidered by the court sitting as a whole in accordance with such rules. Appellate military judges who are assigned to a Court of Criminal Appeals may be commissioned officers or civilians, each of whom must be a member of a bar of a Federal court or of the highest court of a State. The Judge Advocate General shall designate as chief judge one of the appellate military judges of the Court of Criminal Appeals established by him. The chief judge shall determine on which panels of the court the appellate judges assigned to the court will serve and which military judge assigned to the court will act as the senior judge on each panel.

(b) The Judge Advocate General shall refer to a Court of Criminal Appeals the record in each case of trial by court-martial—

(1) in which the sentence, as approved, extends to death, dismissal of a commissioned officer, cadet, or midshipman, dishonorable or bad-conduct discharge, or confinement for one year or more; and

(2) except in the case of a sentence extending to death, the right to appellate review has not been waived or an appeal has not been withdrawn under section 861 of this title (article 61).

(c) In a case referred to it, the Court of Criminal Appeals may act only with respect to the findings and sentence as approved by the convening authority. It may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.

(d) If the Court of Criminal Appeals sets aside the findings and sentence, it may, except where the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If it sets aside the findings and sentence and does not order a rehearing, it shall order that the charges be dismissed.

(e) The Judge Advocate General shall, unless there is to be further action by the President, the Secretary concerned, the Court of Appeals for the Armed Forces, or the Supreme Court, instruct the convening authority to take action in accordance with the decision of the Court of Criminal Appeals. If the Court of Criminal Appeals has ordered a rehearing but the convening authority finds a rehearing impracticable, he may dismiss the charges.

(f) The Judge Advocates General shall prescribe uniform rules of procedure for Courts of [Criminal Appeals] and shall meet periodically to formulate policies and procedure in regard to review of court-martial cases in the offices of the Judge Advocates General and by Courts of [Criminal Appeals].

(g) No member of a Court of Criminal Appeals shall be required, or on his own initiative be permitted, to prepare, approve, disapprove, review, or submit, with respect to any other member of the same or another Court of Criminal Appeals, an effectiveness, fitness, or efficiency report, or any other report or document used in whole or in part for the purpose of determining whether a member of the armed forces is qualified to be advanced in grade, or in determining the assignment or transfer of a member of the armed forces, or in determining whether a member of the armed forces should be retained on active duty.

(h) No member of a Court of Criminal Appeals shall be eligible to review the record of any trial if such member served as investigating officer in the case or served as a member of the court-martial before which such trial was conducted, or served as military judge, trial or defense counsel, or reviewing officer of such trial.

Section 323(a) of Title 49 of the United States Code provides:

(a) The Secretary of Transportation may appoint and fix the pay of officers and employees of the Department of Transportation and may prescribe their duties and powers.

(5)

Supreme Court, U.S.
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No. 96-262

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

JON E. EDMOND, ET AL.,

Petitioners,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Armed Forces

REPLY BRIEF OF PETITIONERS

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Introduction

Before responding to the Government's specific arguments on the statutory interpretation and constitutional issues, there are two points in its brief that cut across both issues and that warrant a reply.

First, the Government contends that Congress decided that judges of the Courts of Criminal Appeals ("CCA") are inferior officers and that this Court should give deference to that determination. Br. 31. It is true that Congress did not require that CCA judges be appointed by the President, with the advice and consent of the Senate, but that will be true in every case in which the constitutional status of an officer is challenged. But here, unlike *Morrison v. Olson*, 487 U.S. 654 (1988), where two central issues in the legislative debates were the status of the office of independent counsel and how the Appointments Clause could be satisfied, there is not a shred of evidence that anyone in Congress ever gave

the issue a moment's consideration. This is true both in 1950, when the UCMJ was enacted, and in 1968 when Article 66 was amended to require the formal establishment of the Courts of Military Review ("CMR"), the predecessors of the CCAs. And it is equally true that, in 1966 when the Department of Transportation Act was passed, so far as can be determined, the issue of military appellate judges, let alone their constitutional status, was never discussed.

There is another reason why it is apparent that this issue was never considered by Congress in 1968 or before. Even prior to *Buckley v. Valeo*, 424 U.S. 1 (1976), which revitalized the Appointments Clause, it would have been obvious that the Judge Advocates General of the military services ("JAGs") could not appoint inferior officers. Accordingly, the only logical conclusion to be drawn, and one which is entirely consistent with all of the accessible legislative history, is that Congress never gave the Appointments Clause issue a thought, much less made a considered judgment that CCA judges are inferior officers. *Compare Rostker v. Goldberg*, 453 U.S. 57, 64 (1981) ("customary deference accorded to congressional judgments . . . when Congress specifically considered the question of the Act's constitutionality"). We agree that, in close cases, a studied determination by Congress that an office is an inferior, rather than a principal one, might tip the balance, but we disagree that Congress made such a determination in this instance.

Second, respondent suggests that a ruling in petitioners' favor would create a major problem for the Government. Br. 32-33, 41-42. To be sure, Congress will have to amend the law to provide for a proper method of appointment for the civilian judges of the CCAs. If the Court agrees with our statutory argument, Congress will have to choose whether a Department Head or the President, either with or without the advice and consent of the Senate, should make the appointments, and whether there should be a specified term of office. It would also require Congress to consider

the relationship between the military and civilian judges and the relationship between CCA judges and the Judge Advocates General. In the interim, the four military CCA judges in the Coast Guard can handle the relatively modest number of yearly appeals (20), plus the cases that must be reconsidered on remand before a properly constituted panel. And if there are short-term administrative problems, they are traceable directly to the January 1993 decision to attempt to have the Secretary of Transportation reappoint the civilian judges, instead of seeking immediate relief from Congress or having the President make the appointment with the advice and consent of the Senate.

I. The Secretary Lacks Statutory Authority to Appoint CCA Judges.

The Government never actually states, in one place, how it believes that the statutory scheme here fits together, but as we understand it, this is how its system works. The Secretary of Transportation has the power to appoint civilian judges to the CCA, the General Counsel of the Transportation Department (who is the JAG for the Coast Guard) has the power to reassign civilian as well as military CCA judges to other positions (subject to the direction of the Secretary), the Secretary has the power to terminate the appointment of a civilian CCA judge, and the General Counsel continues to exercise all other powers under Article 66, including the power to select the Chief Judge of the Coast Guard CCA. The theory of this approach appears to be that Article 66 remains in effect to the maximum extent possible, consistent with the Appointments Clause, but that appointments for civilian judges are necessarily made under the DOT Act.

There are a number of problems with this approach which produces a scheme that is highly unusual if not unprecedented. At the very least, this fact should raise a question of whether Congress intended to create such an

arrangement, especially in the absence of clear language mandating it.

The most significant incongruity is that the Secretary appoints civilian judges, but the General Counsel removes them from their positions (although the Secretary may be the only one who can actually discharge them). The independent counsel statute also had different appointing and removing authorities, but both persons were eligible to appoint inferior officers under the Appointments Clause. Moreover, there was a strong policy reason why Congress bifurcated those responsibilities under the independent counsel statute: it wanted to keep the appointing power away from the Executive — to assure that the counsel would be truly independent — and it was concerned that the court which appointed the counsel not become enmeshed in the operations of an executive office, because that would create other problems under Article III. *See Morrison*, *supra*, 487 U.S. at 692-93, 695-96. Here, of course, no similar problems exist here since the President, if not the Secretary, could fulfill the appointment and removal functions with no constitutional or other problems.

The Government's response appears to be that this seeming anomaly does not matter because the Secretary can order his General Counsel to reassign a civilian judge and presumably fire the General Counsel for failure to carry out that order. Again, there are several flaws in this reasoning. It is quite doubtful that the Secretary can fire the General Counsel since that office is filled by the President, with the advice and consent of the Senate, not the Secretary. 49 U.S.C. § 102(e). While there can be no doubt that the President could fire the General Counsel, just as he can fire other high ranking officers whom he appoints, *Myers v. United States*, 272 U.S. 52 (1926), the Government cites no authority allowing the Secretary to do so here. Given the long history of disputes between Presidents and their Departments Heads over appointments of sub-cabinet

officers,[1] the casual assumption that the Secretary is entitled to fire his General Counsel at will is unfounded.

On the other hand, if the General Counsel can "reassign" civilian CCA judges by removing them from their positions, can he also place them in a new position, either with or without the Secretary's agreement? And what would that position be, given the limited number of Coast Guard billets for lawyers/judges? In effect, such a reassignment would likely become the functional equivalent of a dismissal, yet even the Government does not claim that the General Counsel may exercise that power over an appointee of the Secretary.

There may well be other incongruities involving this system in which there is divided authority over appointment and removal of civilian judges on the Coast Guard CCA. However, the larger point is that these oddities and the problems they create suggest very strongly that the Government is misreading the applicable statutes and is attempting to put a square peg in a round hole. Surely, given these anomalies, there is every reason *not* to stretch to construe the Secretary's residual appointment power to cover this situation.

The Government recognizes that 49 U.S.C. § 323(a) cannot be read literally to apply to *any* office in the Department because there are a number of instances where Congress has been specific as to the method of appointment and those specific provisions would control over the general

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[1]*See* Carl Brauer, *Lost in Transition: To a New President, Staffing a New Government Looks Easy Next to the Challenge of Getting Elected*, The Atlantic Monthly, November 1988 at 74; Bill Peterson, *Is My Name on the List?*, The Washington Post, January 2, 1981 at A1, quoting incoming director of presidential personnel, E. Pendelton James, regarding sub-cabinet appointees: "These are presidential appointees, not secretarial ones. The final decision will be the president's. You've got to have a choke-hold - a control on who staffs government."

powers in § 323(a). We agree. Our difference is over whether Article 66, which deals directly with the subject of civilian CCA judges, provides a specific method of appointment for those positions.

Petitioners recognize that neither the word "appoint" nor any of its variations appears in Article 66. However, Article 66(a) has been construed since its enactment in 1950 to provide the statutory basis for the appointment of civilian judges to the appellate military tribunals of which the CCAs are the direct lineal descendants. This is apparent from the legislative history of the UCMJ, cited at page 23 of petitioners' opening brief, which demonstrates that this provision was added for the very purpose of permitting the appointment of civilian appellate judges, principally for the benefit of the Coast Guard. All of the Armed Services viewed this provision as allowing their Judge Advocate General to appoint both military and civilian judges to the CCAs and their predecessors, as evidenced by the blank certificate of appointment to the Navy-Marine Corps CMR, attached to petitioners' brief in *Weiss v. United States*, No. 92-1482, a copy of which is attached to this reply.

Moreover, the request to the Secretary to cure the Appointments Clause problem by the judges of the Coast Guard CMR in *United States v. Senior*, 36 M.J. 1016, 1018 (1993), quoted on page 9 of respondent's brief, uses the term "reappoint," which can only sensibly be read to mean that they had been previously "appointed" by someone, presumably the Coast Guard JAG, *i.e.*, the Transportation Department General Counsel and before 1966, his predecessor in the Coast Guard. Therefore, since respondent has pointed to no provision comparable to § 323(a) when the Coast Guard was part of Treasury, it is, in effect, arguing that, in creating the Department of Transportation in 1966, Congress intended to provide a new alternative means of appointing Coast Guard civilian appellate judges, without ever mentioning that change.

Further support for petitioners' interpretation comes from the Secretary's January 15, 1993 appointing memorandum (Appendix A6 to petitioners' brief), which covers all judges, military and civilian. Although less than clear, that memorandum reinforces petitioners' argument that Article 66(a) was construed as an appointing power since it refers to the prior "assignment of appellate military judges" as being "adopted this date as judicial *appointments* of my own." *Id.* (emphasis added). *But see* A7 (making no mention of appointments). Since *someone* had to appoint the civilians to the Coast Guard CMR (and to the Navy's as well when it used civilians), and since there is no doubt that the JAG of each service did the selection, there is no one else who could have been deemed the proper appointing authority under Article 66(a), except the JAG for each service. Accordingly, the Government's attempt to construe Article 66(a) as not providing any power to appoint civilian judges must be rejected based on this consistent pre-*Weiss* history of more than 40 years.

There is another serious flaw in the Government's response: it does not mention the remaining portions of Article 66, discussed at pages 15-16 of petitioners' brief. Those provisions create a system in which the JAGs are assigned the dominant roles vis-s-vis the CCAs, and the Department Heads have none. *See Weiss v. United States*, 114 S. Ct. 752, 762 (1994) (military appellate judges are "under the control of the Judge Advocates General"). Most prominent among the powers possessed by the JAGs is the right to select the Chief Judge, which has been negated by the Secretary's appointment of Chief Judge Baum, and presumably his successors so long as they are civilians. The Government does not attempt to resolve this dilemma, or that created by a potential competition between the General Counsel and the Secretary over whether a civilian or a military officer should fill a future vacancy in other positions on the CCA. Its only answer seems to be that "no useful purpose" would be served by petitioners' construction of

these statutes and by requiring Congress to consider the issue directly (Br. 42). To the contrary, insisting that Congress make its own judgment on this issue would assure that the system that is created makes sense in terms of the relationship between the various actors within the Department, that it is consistent with the similar relationship for the other Armed Services, and that the purposes of the Appointments Clause — to prevent the diffusion of power and to assure accountability — are maintained and not undermined, as the Government's construction of these statutes would do.

At the very least, this highly strained and unusual scheme suggests that Congress never intended this Rube Goldberg-like edifice that the Government has created. The solution is not technically difficult, but only Congress has the power to amend the operative statutes to create a workable and accountable system. The Secretary lacks the authority to fix the problems created by Article 66(a) for civilian judges of the Coast Guard CCA, and this Court should not countenance his attempt to do so.[2]

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[2] *United States v. Hartwell*, 73 U.S. (6 How.) 385 (1868), is of no assistance to respondent. The Court there sustained an indictment of a clerk, appointed by the Assistant Treasurer of the United States at Boston, under a statute which applied to "[a]ll officers and other persons charged with the safe-keeping, transfer, and disbursement of the public money." The defendant argued that the law was limited to principal officers, but the Court rejected that defense and construed the statute broadly to apply to all subordinates. Nowhere is there any mention made of "inferior officers," let alone that the statute applied only to persons who met the definition of an "officer of the United States" in the Appointments Clause. By way of contrast, in *United States v. Germaine*, 99 U.S. 508 (1879), the criminal statute used that very phrase, and the Court found that the defendant was not an officer of the United States both because of his method of appointment

(continued...)

II. Military Appellate Judges Are Principal Officers.

As its principal mode of arguing that military appellate judges are inferior officers, the Government points to individual factors in other cases that have been cited by a Court for one result or another, and then argues that this case is like the other case, or not, depending on whether the similarity supports inferior officer status. There are two problems with this approach: it misuses the factors relied on, and it fails to examine the office of CCA judge as a whole, taking all of its attributes together to see whether it better fits the principal or inferior office category.[3]

For example, respondent points to the lack of a fixed term of office for military appellate judges, but the same is true for the Secretary and other cabinet and sub-cabinet officers, including the General Counsel, who can be fired at will by the President, *Myers*, *supra*, yet all of them are principal officers. The Government attempts to avoid this

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[2](...continued)
and because his position was not permanent, which made him more like a contractor. *Germaine* correctly notes that the appointment of the clerk in *Hartwell* had been approved by his Department Head, but that fact was not the basis of the decision in *Hartwell*. In any event, approval of an appointment is not the equivalent of making an appointment (as the Senate can attest), and there is no evidence here that the Secretary ever approved any CMR appointments prior to January 15, 1993.

[3]We are at a loss to understand the relevance of the discussion on pages 17-19 of respondent's brief regarding the 1789 statutes providing for inferior offices in the original departments of government. Surely, respondent does not equate CCA judges with a "chief Clerk" whose only stated duty is during a vacancy to "have the charge and custody of all records, books and papers appertaining to the said department." Br. 18.

dilemma by stating the rule as applicable only to non-Presidential appointees (Br. 19), but never explains the source or basis of that limitation.

More fundamentally, as we read *Morrison*, "tenure" concerns the length of the existence of the office, not how long a given individual remains in that position. Thus, the independent counsel was an inferior officer, in part, because as soon as her assigned investigation and ensuing prosecutions were completed, the office itself terminated. 487 U.S. at 672. During its existence, there might be more than one occupant of the office, but it is the term of the office, not of the officer, that is relevant. Here, the office — military appellate judge for each of the Armed Forces — is permanent, although the person holding each of those positions changes from time to time, albeit quite infrequently in the case of civilian Coast Guard judges.

Similarly, the Government endeavors to make much of the extent of the supervision and related constraints on military appellate judges, but that too is overblown, or the term "supervision" is used in a way that makes no sense. For example, respondent argues that CCAs are limited in power because they cannot convict someone whom the court martial or convening authority has acquitted, but can only reverse a conviction or reduce a sentence. That statement is true, but it also applies to every criminal appeals court in the United States, including this Court, because the Double Jeopardy Clause mandates that limitation.

The Government also argues that the United States Court of Appeals for the Armed Forces and this Court have broader pow[illegible] than the CCAs, since they can reinstate what a CCA has set aside, as well as setting aside convictions on their own (Br. 25). Again that statement is true, but it conveniently overlooks the broader powers of the CCA to overturn factual findings and to reduce the sentence, neither

of which is available to the higher courts or to other appellate courts in the federal system in criminal appeals.[4]

Respondent's brief also suggests that the General Counsel/JAGs provide day-to-day supervision for CCA judges, but do not spell out how that occurs (Br. 22). Surely, "supervision" could not conceivably apply to writing opinions or other judicial matters, and there is no concrete evidence of any other specific manner in which the alleged supervision takes place. The only supervisory power that even the Government asserts for the General Counsel is to reassign a civilian judge, but once again the Government recognizes that decisions of that kind cannot be based on the way that a judge decides cases (Br. 23). And even assuming that the Secretary can fire a civilian judge, which the Government does not acknowledge, he has no other supervisory role in the process.

The proper analytical approach, we submit, and the one adopted in *Morrison*, is to focus on the office, not the officeholder, and decide where the office fits into the federal government's division between principal and inferior offices. Here, the position of judge on the Courts of Criminal Appeals is a principal office primarily because the CCAs have the obligation to review every conviction for a serious crime in the military. Their powers of review in criminal cases are more expansive than those of Article III appellate judges or those of judges in any other criminal justice system in the United States of which we are aware. And, as a practical matter, their word is the final word in almost every case, because there is no right to further review, but only

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[4]Respondent also argues that CCA judges are inferior officers because their decisions are subject "to further review by the Court of Appeals for the Armed Forces." Br. 25. If further review is the determinative factor, then the latter court, whose members are appointed for 15 years terms by the President with the advice and consent of the Senate, is also an inferior one.

review by permission in the CAAF, which is rarely granted. Pet. Br. 29-30.

Finally, we are at a loss to understand the Government's response to our argument based on *Freytag v. Commissioner*, 501 U.S. 868 (1991). At one point, it seems to argue that those who appoint inferior officers need not themselves be principal officers, citing Justice Souter's concurrence in *Weiss* (Br. 29). But its brief never explains how that is consistent with the structure of the Appointments Clause, or why the Framers, who were very concerned with diffusion of power and lack of accountability, *Freytag*, 501 U.S. at 884-85, would allow untold numbers of inferior officers to appoint other inferior officers. And it would be inconsistent with the fact that, when Congress has delegated the power to appoint inferior officers, it has never, to our knowledge, allowed the appointing authority to be other than a principal officer. While *Freytag* did not decide the status of Tax Court Judges, the most sensible reading of the two opinions there is that they both assumed that Tax Court Judges are principal, not inferior, officers.

If that is the case, judges of the Courts of Criminal Appeals are at least as important in their scheme as Tax Court Judges are in theirs. Once again, there are factors that suggest that CCA judges might be inferior officers, but on the key issue of finality — whether it is likely that anyone will actually alter their decisions — Tax Court Judges are more "inferior" since all of their rulings are appealable as of right to their "superiors" in the Circuit Courts of Appeals. But for the Courts of Criminal Appeals, the "superior" is the Court of Appeals for the Armed Forces, to which there is no appeal of right and which hears a very small percentage of the cases decided by the CCAs.

In our view, for judicial offices, the factor of practical finality is the most significant one because the normal rules of supervision and daily accountability have no meaning between levels of judicial decisionmakers. The focus on practical finality is most responsive to the difference between

a "principal" and an "inferior" judicial office, at least where the office is a permanent institution. This focus on finality explains why administrative law judges, special tax court judges, magistrate judges, and other similar judicial-type officers are inferior officers since all of their decisions are subject to at least one level of review, in either an agency or a court, as a matter of right. The issue is not what the standard of review is, but whether the tribunal's decisions are always reviewable by a higher body that makes it an inferior, not principal office. Seen in this light, there can be no doubt that, like the Tax Court Judges in *Freytag*, the judges of the Courts of Criminal Appeals are principal not inferior officers, and as such, they must be appointed by the President, with the advice and consent of the Senate. At the very least, this substantial constitutional question presents a further reason to resolve the statutory issue in petitioners' favor.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed, and these cases should be remanded so that a properly constituted panel of the Coast Guard Court of Criminal Appeals can hear the appeals of these six petitioners.

Respectfully submitted,

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February 1997

United States Navy—Marine Corps
Court of Military Review

The Judge Advocate General

To all who shall see these presents
Greetings:

Know ye that reposing special trust in the Wisdom, Uprightness and Learning of

and by virtue of the power vested in me by an Act of the United States Congress, I do appoint him

Appellate Military Judge
United States Navy — Marine Corps Court of Military Review

and do authorize and empower him to execute and fulfill the duties of that office according to the Constitution of the United States and the Uniform Code of Military Justice, and to have and to hold the said office, with all the powers, privileges and emoluments to the same appertaining to him.

In witness whereof, I have hereunto subscribed my name and affixed my seal of office at Washington, D.C., this _____ in the year of our Lord one thousand nine hundred and _____

Rear Admiral, JAGC, U. S. Navy
The Judge Advocate General